UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA v. ANTHONY J. CUTI and WILLIAM J. TENNANT, Defendants.	Case No. 1:08-CR-00972-DAB

DEFENDANTS' REQUESTS TO CHARGE
AND RESPONSES TO GOVERNMENT'S REQUESTS TO CHARGE

Pursuant to Federal Rule of Criminal Procedure 30, Defendants Anthony J. Cuti and William J. Tennant respectfully submit the following requests to charge the jury and responses to the Government's requests to charge.

Defendants respectfully reserve the opportunity to submit additional or modified instructions if necessary.

Respectfully submitted,

/s/ Reid H. Weingarten

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Pursuant to Rule 30 of the Federal Rules of Criminal Procedure, the Defendants, by their respective counsel, respectfully submit their requests to charge the jury and their objections and responses to the Government's requests to charge. Defendants respectfully reserve the opportunity to submit additional or modified instructions if necessary.

Pursuant to this Court's Criminal Trial Rules and Procedures, Defendants' requests to charge follow the sequence and subject matter of the Government's requests. Defense Requests with whole numbers correspond directly to the Government's Request of the same number. (In a few instances, the corresponding request may have a different title, where the Defendants object to the Government's title, or where the Defendants offer a related model instruction in place of the Government's proposed instruction.) Additional Defense Requests for which there is not a corresponding Government Request are inserted by subject matter, and are numbered, for example, Defense Request 24-A; Defense Request 24-B, *et cetera*.

Defense Preliminary Requests, requested for the beginning of trial (for which there are no corresponding Government Requests) are numbered "Defense Request No. PR.1," *et cetera*.

The Defendants' position with respect to each request is summarized at the top of each page (and also in the Table of Contents). Citations to model instructions or other authorities for Defendants' requests are contained in footnotes at the end of each request. The grounds for Defendants' objections and substantive responses to the Government's requests are set out in text following each request.

I. GENERAL OBJECTION

In the following requests to charge, the Defendants have tried to adhere to Judge Sand's model instructions (L. Sand *et al.*, Modern Federal Jury Instructions (2009)) (hereinafter, "Sand"), which are commonly followed in this District, or to other recognized model instructions such as the Benchbook for U.S. District Court Judges.[1]

By contrast, the Government's requests to charge are taken principally from an amalgam of unpublished jury charges from 14 different trials conducted by 13 different judges in this District, dating as far back as the 1970s.[2] The unreported charges relied on by the Government are not readily available to the Defendants or to this Court, and they do not neatly track the structure and subject matter of the instructions set out in the Sand models. Because the Government's unreported trial charges date from an extended past time period, one cannot tell, as one can from the commentary in the Sand treatise, whether parts of those earlier charges have been affected or even overruled by intervening case law. In addition, without having those unpublished charges readily available, we cannot tell whether the selection or adaptation of those charges has been evenhanded or has been slanted favorably to the prosecution.

Defendants respectfully submit that the Defense Requests to Charge are more consistent and evenhanded, and more faithfully track the model instructions recognized in this

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[1] Defendants have, in a few instances, cited to three unpublished jury charges in recent trials that have involved parallel charges of conspiracy, securities fraud, and false statements to the SEC: *United States v. Treacy*, No. 1:08-cr-366-JSR (S.D.N.Y. 2009); *United States v. Ebbers*, No. 02-cr-144-BSJ (S.D.N.Y. 2005), and *United States v. Forbes*, No. 3:02 CR 264 (D. Conn. 2007). The relevant portions of those unreported charges are attached. Most of these citations are in addition to, not in lieu of, the Sand model instructions.

[2] *See, e.g.*, Gov. Req. No. 33, adapted from Judge Werker's charge in *United States v. Barnes*, S 77 Cr. 190 (Nov. 29, 1977).

District than the Government's quilt of excerpts from unreported charges. Defendants therefore respectfully object to any presumption in favor of the Government's proposed instructions, and respectfully urge the Court, in resolving any differences between the parties' proposals, to begin with the recognized model instructions proposed by the Defense.

II. PRELIMINARY INSTRUCTIONS - AT BEGINNING OF TRIAL

The Defendants respectfully request that, at the beginning of trial, the Court give its usual preliminary instructions on the following issues. (The Government has not proposed any preliminary instructions for the beginning of trial.) In the event that the Court does not have a standard preliminary instruction on one or more of these issues, Defendants respectfully note applicable model instructions in the footnotes that follow.

PR.1 Preliminary Jury Instructions in a Criminal Case[1]

PR.2 Publicity[2]

PR.3 No Research and Investigation[3]

PR.4 Government as a Party[4]

PR.5 Improper Considerations – Race, Religion, National Origin, Sex, or Age[5]

PR.6 Conduct of Counsel[6]

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[1] Benchbook for U.S. District Court Judges, Instrs. 2.07, 2.08 (4th ed., Mar. 2000 rev.). Because Defendants offer a Summary of Charges preliminary instruction below that is tailored to this case (Def. Req. PR.10, *infra*), we respectfully suggest omitting the "Summary of applicable law" section of Benchbook Instr. 2.07 (Benchbook p. 97).

[2] 1 L. Sand, *et al.*, Modern Fed. Jury Instrs., Instr. 2-14 (2009) (hereinafter, "Sand"). Defendants respectfully suggest adding the internet to the Sand model instruction's discussion of newspapers, radio and television.

[3] 1 Sand Instr. 6.190 (2001 ed.); Sixth Cir. Pattern Jury Instr. (Crim.) 8.02 (2007).

[4] 1 Sand Instr. 2-5.

[5] 1 Sand Instr. 2-11.

[6] 1 Sand Instr. 2-8.

PR.7 Court's Questions to Witnesses[7]

[Defendants propose a case-specific PR.8, below]

PR.9 Indictment is Not Evidence[8]

[Defendants propose case-specific instructions PR.10 and PR.11, below]

PR.12 Presumption of Innocence and Burden of Proof[9]

PR.13 Reasonable Doubt[10]

In the Court's admonition to jurors not to discuss or read about the case, Defendants rsepectfully suggest that the Court specifically admonish the jury not to discuss the case on any social network or electronic media such as Twitter, Facebook, or blogs, and not to read anything about the case posted on any of those media.

In addition, Defendants respectfully request the following additional preliminary instructions set out in full beginning on the next page:

PR.8 Witness Immunity

PR.10 Multiple Counts – Multiple Defendants

PR.11 Summary of Charges

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[7] 1 Sand Instr. 2-3 (Role of the Jury, eighth paragraph only).

[8] 1 Sand Instr. 3-1.

[9] 1 Sand Instr. 4-1. Although the concepts of presumption of innocence, burden of proof and reasonable doubt are covered in summary fashion in, e.g., the Benchbook introductory in-struction, Defendants respectfully submit that because these concepts are the fundamental, bed-rock requirements of a fair trial, *e.g., Taylor v. Kentucky*, 436 U.S. 478, 483 (1978); *In re Winship*, 397 U.S. 358, 362, 363 (1970), they should be explained to the jury in more detail than Benchbook Instr. 2.07 contains. See, e.g., Taylor, 436 U.S. at 484-85; *United States v. Velez-Vasquez*, 116 F.3d 58, 61 (2d Cir. 1997).

[10] 1 Sand Instr. 4-2; *see also* note 9, *supra*.

The Defendants request the following additional preliminary instructions.

DEFENSE REQUEST NO. PR.8

Preliminary Instruction – Immunity

The testimony of some witnesses must be considered with more caution than the testimony of other witnesses.

For example, a witness who has been promised that he or she will not be charged or prosecuted, or a witness who hopes to gain more favorable treatment in his or her own case, may have a reason to make a false statement because the witness wants to strike a good bargain with the government.

So, while a witness of that kind may be entirely truthful when testifying, you should consider that testimony with more caution than the testimony of other witnesses.[1]

[1] Eleventh Circuit Pattern Jury Instructions, Criminal Cases, Special Instruction No. 1.1 (2003) (reference to paid informers omitted); *see also Banks v. Dretke*, 540 U.S. 668, 701-02 (2004) (approving this and similar pattern instructions in the First, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits); *On Lee v. United States*, 343 U.S. 747, 757 (1952).

DEFENSE REQUEST NO. PR.10

Preliminary Instruction – Multiple Counts – Multiple Defendants

The indictment contains a total of five counts. Each count charges one or both of the defendants with a different crime. Counts One and Two contain charges against Mr. Cuti and Mr. Tennant. Counts Three, Four and Five contain charges only against Mr. Cuti.

There are two defendants on trial before you. You must, as a matter of law, consider each count of the indictment, any evidence pertaining to it, and each defendant's involvement in each count charged against him separately. You will be required to return a separate verdict on each defendant for each count on which he is charged. The number of charges is not evidence of guilt and must not influence your decisions in any way.

In reaching your verdict, bear in mind that guilt or innocence is personal and individual. Your verdict of guilty or not guilty must be based solely upon the evidence about each defendant. The case against each defendant, on each count, stands or falls upon the proof or lack of proof against that defendant alone, and your verdict as to either defendant on any count should not control your decision as to the other defendant or any other count. No other considerations are proper.[1]

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[1] Adapted from 1 Sand Instr. 3-8, to account for number of defendants and counts in this indictment. In the first sentence of the third paragraph, the words "or innocence" have been added for evenhandedness.

DEFENSE REQUEST NO. PR.11

Preliminary Instruction – Summary of Charges

I will give you detailed instructions on the law at the end of the case, and those instructions will control your deliberations and decision. But in order to help you follow the evidence, I will now give you a brief summary of the charges against the defendants.

The indictment contains five counts.

Count One charges that both defendants knowingly and intentionally entered into a criminal conspiracy to defraud holders of Duane Reade securities and other members of the investing public; to willfully make and cause to be made false and misleading statements of material fact in Duane Reade reports and documents filed with the SEC; to willfully make and cause to be made false and misleading statements of material fact to auditors; and to willfully falsify and cause to be falsified the books, records, and accounts of Duane Reade.

Count Two charges both defendants with committing securities fraud by knowingly and willfully making and causing to be made false and misleading statements of material fact in connection with documents filed with the SEC, specifically Duane Reade's Forms 10-K and Forms 10-Q for the fourth quarter of fiscal year 2000 through the fourth quarter of fiscal year 2004.

Counts Three, Four and Five charge Mr. Cuti with knowingly and willfully making, and causing to be made, false and misleading statements of material fact in reports filed with the SEC, specifically Duane Reade's Form 10-K for fiscal year 2003, Duane Reade's Form 10-Q for the second quarter of 2004, and Duane Reade's Form 10-K for fiscal year 2004.

The defendants are not charged with committing any crime other than the offenses contained in the indictment. Each defendant has denied that he is guilty of these charges.[1]

Objection to reading the indictment: Defendants respectfully submit that a summary such as this proposed instruction is shorter and clearer than reading the indictment to the jury. Reading the full indictment would be unnecessarily time consuming and risk losing the jury's attention. In addition, reading the entire indictment would be unduly prejudicial and suggestive of guilt, as the jury would hear from the mouth of the Court the entirety of the Government's allegations of guilt, without a corresponding account of the Defendants' rebuttal and their assertions of innocence.

For evenhandedness, any reading or summary of the charges should by the statement that each defendant has denied that he is guilty of the charges.

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[1] Adapted from Benchbook Instr. 2.07 and the indictment. The last two sentences are taken from 1 Sand Instrs. 3-2 and 3-3.

II. INSTRUCTIONS AT CLOSE OF TRIAL

A. GENERAL REQUESTS

REQUEST NO. 1

General Requests

The Defendants concur in the Government's request that the Court give its usual instructions on the following general matters:

a. Function of Court and Jury

b. Indictment Is Not Evidence

c. Statements of Court and Counsel Not Evidence

f. Government as a Party

g. Definitions, Explanations, and Example of Direct and Circumstantial Evidence

i. Right to See Exhibits and Have Testimony Read During Deliberations

k. Punishment Is Not to be Considered

m. Stipulations (If Applicable)

Response to Government's General Requests 1.d, 1.e, 1.h, 1.j, and 1.*l*

With regard to Burden of Proof and Presumption of Innocence (Gov. Req. 1.d) and Reasonable Doubt (Gov. Req. 1.e), Defendants request that the Court give the Sand model instructions, 1 Sand Instrs. 4-1 and 4-2.[1]

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[1] Because the presumption of innocence, the Government's burden of proof, and the reasonable doubt standard are fundamental requirements of a fair trial, see, e.g., Taylor v. Kentucky, 436 U.S. 478, 483 (1978); *In re Winship*, 397 U.S. 358, 362, 363 (1970), Defendants respectfully and specifically request the Sand model instructions. The Second Circuit supports both instructions, *see, e.g.*, *United States v. Velez-Vasquez*, 116 F.3d 58, 61 (2d Cir. 1997), and has held, with respect to the presumption of innocence, that the Sand model instruction, "unlike much of the suggested language in the various pattern instructions, is not optional." *United States v. Birbal*, 62 F.3d 456, 460 (2d Cir. 1995) (citing *Jackson v. Virginia*, 443 U.S. 307, 320

Defendants' requested general instruction on Witness Credibility (Gov. Req. 1.h) is set forth in Def. Req. No. 24-B, *infra*.

Defendants object to any instruction on Sympathy (Gov. Req. 1.j), unless warranted by any blatant appeal to sympathy in defense argument. *See* 1 Sand Instr. 2-12, Comment (stating that sympathy instruction will not always be necessary, in the absence of blatant appeals to sympathy). In the absence of a blatant appeal to sympathy, an instruction similar to the Sand model instruction 2-12 would be unnecessary, one-sided, and unduly suggestive of conviction.

Regarding unanimity (Gov. Req. 1.*l*), the subject is addressed in the Government's Request No. 37 below ("Conclusion"). In place of Gov. Req. No. 37, the Defendants offer specific instructions for Duty to Consult and Need For Unanimity (Def. Req. No. 37, *infra*) and Unanimity of Theory (Def. Req. No. 37-A, *infra*).

Additional General Requests:

In addition to the Government's General Requests, Defendants further respectfully request that the Court give its usual instructions on the following additional general matters. In the event that the Court does not have a standard instruction on one or more of these issues, Defendants respectfully note applicable model instructions in the footnotes that follow:

n. Publicity[1]

o. Impeachment by Prior Inconsistent Statement[2]

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n.14 (1979)).

[1] 1 Sand Instr. 2-17. (Defendants respectfully suggest the addition of the internet to the model's discussion of newspapers, radio and television.)

[2] 1 Sand Instr. 7-9.

p. Testimony, Exhibits, Stipulations, and Judicial Notice[3]

q. Transcripts of Tape Recordings (If Applicable)[4]

r. Number of Witnesses and Uncontradicted Testimony[5]

s. Conduct of Counsel[6]

t. Counsel Cooperation[7]

u. Charts and Summaries Admitted As Evidence (If Applicable)[8]

v. Charts and Summaries Not Admitted As Evidence (If Applicable)[9]

w. Consider Each Defendant Separately[10]

x. No Research and Investigation[11]

y. Selection of a Foreperson

If it is the Court's practice to send the Indictment to the jury during deliberations, Defendants request Sand model Instruction 9-4, which reiterates, among other things, that the indictment "is merely an accusation and is not to be used by you as any proof of the conduct charged."

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[3] 1 Sand Instr. 5-4.

[4] 1 Sand Instr. 5-9.

[5] 1 Sand Instr. 4-3.

[6] 1 Sand Instr. 2-8.

[7] 1 Sand Instr. 2-10 (second paragraph).

[8] 1 Sand Instr. 5-12.

[9] 1 Sand Instr. 5-13.

[10] 1 Sand Instr. 3-5.

[11] 1 Sand Instr. 6-190 (2001 ed.); Sixth Circuit Pattern Jury Instr. (Crim.) 8.02 (2007).

B. THE CHARGES

The Defendants request the following instruction in addition to the Government's requests.[1]

DEFENSE REQUEST NO. 1-A

Multiple Counts – Multiple Defendants

The indictment contains a total of five counts. Each count charges one or both of the defendants with a different crime. Counts One and Two contain charges against Mr. Cuti and Mr. Tennant. Counts Three, Four and Five contain charges only against Mr. Cuti.

There are two defendants on trial before you. You must, as a matter of law, consider each count of the indictment, any evidence pertaining to it, and each defendant's involvement in each count charged against him separately. You will be required to return a separate verdict on each defendant for each count on which he is charged. The number of charges is not evidence of guilt and must not influence your decisions in any way.

In reaching your verdict, bear in mind that guilt or innocence is personal and individual. Your verdict of guilty or not guilty must be based solely upon the evidence about each defendant. The case against each defendant, on each count, stands or falls upon the proof or lack of proof against that defendant alone, and your verdict as to either defendant on any

[1] The Government has not requested any corresponding instruction at the beginning of the charge concerning the indictment. The Government has requested a truncated version of this instruction at the close of the charge, before the jury deliberates. Gov. Req. No. 35. The Defense has responded to that request by offering instead Def. Req. No. 35, *infra*.

count should not control your decision as to the other defendant or any other count. No other considerations are proper.[2]

Response to Gov. Req. No. 35: The Government has proposed a "multiple counts" instruction, Gov. Req. No. 35, at the end of the charge. Defendants respectfully submit that it is appropriate to give the "multiple counts, multiple defendants" instruction at the beginning of the charge, prior to the summary of the charges in the indictment. At the conclusion of the charge, where the Government has proposed the "multiple counts" instruction, the Defense proposes instead the "Consider Each Defendant Separately" instruction. *See* Def. Req. No. 35, *infra* (based on 1 Sand Instr. 3-5).

With regard to the substance of the "multiple counts, multiple defendants" instruction, the Government's Req. No. 35 unnecessarily truncates the Sand model instruction, 1 Sand Instr. 3-8. The full version of the model instruction contains important instructions that (1) the number of charges is not evidence of guilt and must not influence the jury's decision; (2) guilt (or, we have added, innocence) is personal and individual, and the verdict for each defendant must be based solely upon the evidence about that defendant; and (3) the jury's verdict regarding any one particular count and defendant should not control its decision as to any other defendant or any other count.

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[2] Adapted from 1 Sand Instr. 3-8, to account for number of defendants and counts in this indictment. In the third paragraph, the words "or innocence" have been added for evenhandedness.

The Defendants request the following instruction in addition to the Government's requests.

DEFENSE REQUEST NO. 1-B

Consider Only the Charges
(If "other acts" evidence is introduced)

The defendants are not charged with committing any crimes other than the offenses contained in the indictment. You have heard evidence of other acts allegedly committed by a defendant. When that evidence was introduced, I instructed you that it was to be considered by you solely for a limited purpose. I will explain that limited purpose again in a moment. But I want to emphasize to you now that you are not to consider that evidence for any other purpose. For each defendant, you are only to return a verdict as to the specific charges against that particular defendant contained in the indictment.[1]

[1] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 3-3 (2009), to account for multiple defendants.

The Defendants object to Government Request No. 2, and in its place offer the following instruction.

DEFENSE REQUEST NO. 2

The Indictment

The indictment contains five counts.

Count One charges that both defendants knowingly and intentionally entered into a criminal conspiracy to defraud holders of Duane Reade securities and other members of the investing public; to willfully make and cause to be made false and misleading statements of material fact in Duane Reade reports and documents filed with the SEC; to willfully make and cause to be made false and misleading statements of material fact to auditors; and to willfully falsify and cause to be falsified the books, records, and accounts of Duane Reade.

Count Two charges both defendants with committing securities fraud by knowingly and willfully making and causing to be made false and misleading statements of material fact in connection with documents filed with the SEC, specifically Duane Reade's Forms 10-K and Forms 10-Q for the fourth quarter of fiscal year 2000 through the fourth quarter of fiscal year 2004.

Counts Three, Four and Five charge Mr. Cuti with knowingly and willfully making, and causing to be made, false and misleading statements of material fact in reports filed with the SEC, specifically Duane Reade's Form 10-K for fiscal year 2003, Duane Reade's Form 10-Q for the second quarter of 2004, and Duane Reade's Form 10-K for fiscal year 2004.

The defendants are not charged with committing any crime other than the offenses contained in the indictment. Each defendant has denied that he is guilty of these charges.[1]

Objections and Response to Gov. Req. No. 2: Defendants offer this instruction in place of Gov. Req. No. 2 for the following reasons:

1. Def. Req. No. 2 is a clearer summary of the offenses charged in the indictment.

2. Gov. Req. No. 2 (second paragraph) does not sufficiently instruct the jury regarding the requirement of separate consideration of each charge as to each Defendant. On this point, Defendants have offered Def. Req. No. 1-A.

3. The fourth paragraph of Gov. Req. No. 2, describing the difference between conspiracy and substantive charges, is more appropriately addressed in Req. No. 3 ("Conspiracy and Substantive Counts"). *See* Def. Req. No. 3 below.

4. The last paragraph of Gov. Req. No. 2 is unnecessary and potentially confusing to the jury. It suggests there is some connection between the charged objects of the conspiracy in Count One and the charged substantive offenses in Counts Two through Five, in contrast with the parties' respective Requests No. 3 (and Def. Req. No. 1-A), which instruct that the conspiracy and substantive charges in the respective counts of the indictment are distinct and must be considered independently. It is also potentially confusing in that it suggests the charged objects of the conspiracy and the charged substantive offenses are coextensive, when in fact two

[1] Adapted from Benchbook Instr. 2.07 and the indictment. The last two sentences are taken from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instrs. 3-2 and 3-3 (2009).

of the charged objects of the conspiracy (false statements to auditors, and false books and records) are not charged as substantive offenses.

5. For evenhandedness, the summary of the charges should also state that each defendant has denied that he is guilty of the charges.

The Defendants generally accept, with proposed modifications, Government Request No. 3. The following Request combines Government Request No. 3 with relevant language from Government Request No. 2.

DEFENSE REQUEST NO. 3

Conspiracy and Substantive Counts

As I will explain in more detail in a few moments, a conspiracy, such as is charged in Count One, is a criminal agreement to violate the law. The other charges in the Indictment, set forth in Counts Two through Five, allege what are called "substantive" violations, that is, they allege the actual commission of offenses.

A conspiracy to commit a crime is an entirely separate and different offense from the substantive crime which may be the goal or "object" of the conspiracy. Thus, if a conspiracy exists and a member of the conspiracy takes some step (called an "overt act") to further the goal or "object" of the conspiracy (as I will instruct you shortly), the conspiracy is punishable as a crime, whether or not the substantive offense that was the goal of the conspiracy was actually committed.

Of course, if a defendant participates in a conspiracy and the crime or crimes which were the object(s) of the conspiracy were committed, the defendant may be guilty of both the conspiracy and the substantive crime, as I will instruct you shortly. The point simply is that the substantive crime or crimes that were the object of the conspiracy need not have been actually committed for a conspiracy to exist.

Response to Gov. Req. No. 3: Defense Req. No. 3 combines Gov. Req. No. 3 with relevant language from Gov. Req. No. 2, and modifies it to eliminate duplication and to address the following objections and concerns:

1. Defendants object that the Government's proposed language in the fourth paragraph of Gov. Req. No. 2, "the substantive counts are based on the actual commission of offenses," unduly suggests guilt, in that it suggests the offenses charged in Counts Two through Five have actually been committed. The Defense instead offers the last sentence of the first paragraph in Def. Req. No. 3, stating in relevant part that those counts "allege the actual commission of offenses."

2. Defendants object that the Government's proposed language in the last two sentences of the first paragraph of Gov. Req. No. 3 (stating that "if a conspiracy exists . . . it is still punishable as a crime" and that "there is no need to prove that the crime or crimes . . . were actually committed") is potentially inaccurate and misleading, in that it makes no mention of the overt act requirement, and could lead the jury to convict without a finding of an overt act. The Defense offers instead the second sentence of the second paragraph of Def. Req. No. 3, which more accurately states the law including the overt act requirement.

3. The language of the second paragraph of Def. Req. No. 3 has been modified for simplicity and clarity, by substituting "goal" for "objective," and by substituting "whether or not the substantive offense . . . was actually completed" for "even if [the conspiracy] should fail of its purpose."

The Defendants request the following instruction in addition to the Government's requests.

DEFENSE REQUEST NO. 3-A

Cannot Presume Intent or Knowledge from a Defendant's Executive Position

There is one point I want to address before I review the elements of the charged offenses. You have heard testimony that each of the defendants held an executive position at Duane Reade. I instruct you that you may not vote to convict any defendant based solely on the senior position that he held within the company.[1]

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[1] *United States v. Forbes*, No. 3:02 CR 264, at 11 (D. Conn. 2007).

The offenses charged in the Indictment-conspiracy, securities fraud, and false statements in securities filings all have specific criminal mens rea requirements, and do not permit conviction for mere negligence, or imposition of strict liability based on corporate governance responsibilities. *See, e.g., Arthur Andersen LLP v. United States*, 544 U.S. 696, 705-06 (2005) ("limiting criminality to [those] conscious of their wrongdoing sensibly allows [the criminal penalty provision] to reach only those with the level of 'culpability . . . we usually require in order to impose criminal liability'") (quoting *United States v. Aguilar*, 515 U.S. 593, 602 (1995); and citing *Liparota v. United States*, 471 U.S. 419, 426 (1985)).

The *Forbes* charge's discussion of respondeat superior has been omitted because the concept is inapplicable in this case and may confuse the jury.

C. ELEMENTS OF THE CHARGED OFFENSES

The Defendants object to Government Request No. 4, and in its place offer the following instruction.

DEFENSE REQUEST NO. 4

Count One: Conspiracy – The Statute and Nature of the Offense Charged

Count One of the indictment charges that defendants Anthony Cuti and William Tennant came to an agreement or understanding to commit offenses against the United States in violation of Section 371 of Title 18 of the United States Code. That section provides, in part, that:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each . . . .

is guilty of an offense against the United States.

Specifically, Count One of the indictment charges that the defendants knowingly and intentionally entered into an agreement to knowingly and willfully defraud holders of Duane Reade securities and other members of the investing public; to willfully make and cause to be made false and misleading statements of material fact in reports and documents that Duane Reade filed with the SEC; to willfully make and cause to be made false and misleading statements of material fact auditors; and to willfully falsify and cause to be falsified the books, records, and accounts of Duane Reade.[1]

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[1] Adapted from 1 Sand Instr. 3-9, 18 U.S.C. § 371, and Indictment ¶¶ 1-44.

Response to Gov. Req. No. 4: **D**efendants object to Gov. Req. No. 4, and offer Def. Req. No. 4 in its place, for the following reasons:

1. Defendants object to the reading of the indictment as unduly time-consuming, and unduly prejudicial in that it amounts to reading to the jury the Government's theory of guilt, without a corresponding reading of the Defendants' rebuttal or assertion of innocence. Defendants respectfully submit that the fourth paragraph of Def. Req. No. 4 is a short, fair, and easily understood summary of the conspiracy charge.

2. The sixth paragraph of Gov. Req. No. 4 (referring to the indictment's list of overt acts) is unnecessary as overt acts will be the subject of a separate instruction.

3. The seventh paragraph of Gov. Req. No. 4 (regarding a criminal agreement) has already been covered in both parties' Req. No. 3 (and, if given, in Gov. Req. No. 2), and will be covered again in Req. No. 5 (elements of conspiracy) and Req. No. 6 (first element—existence of the conspiracy). Its repetition here is cumulative and unduly emphatic in favor of the prosecution.

4. The eighth paragraph of Gov. Req. No. 4 (regarding conspiracy being independent from any substantive offense) has already been covered in both parties' Req. No. 3 (and, if given, Gov. Req. No. 2). Its repetition here is cumulative and unduly emphatic in favor of the prosecution.

The Defendants object to Government Request No. 5, and in its place offer the following instruction.

DEFENSE REQUEST NO. 5

Count One: Conspiracy – Elements of Conspiracy

In order to satisfy its burden of proof with respect to the allegation of conspiracy, the government must establish each of the following four essential elements beyond a reasonable doubt:

First, that two or more persons entered the unlawful agreement charged in Count One of the indictment starting on or about November 2000;

Second, that the defendant you are considering knowingly and willfully became a member of that alleged conspiracy, and did so with the requisite unlawful intent;

Third, that one of the members of the alleged conspiracy – not necessarily the defendant you are considering, but any one of the conspiracy's members–committed at least one of the overt acts charged in the indictment, during the period of the alleged conspiracy and within the statute of limitations; and

Fourth, that such overt act(s) which you find to have been committed during the period of the alleged conspiracy was/were committed to further some objective of the conspiracy.[1]

[1] Adapted from 1 Sand Instr. 19-3, (1) to account for multiple defendants; (2) to add requisite intent element; (3) to require that the overt act have been committed within the statute of limitations, and (4) to incorporate some of the Government's suggested language from Gov. Req. No. 5. *See also United States v. Treacy*, No. 1:08-cr-366-JSR (S.D.N.Y. 2009); *United States v. Ebbers*, No. 02-cr-144-BSJ (S.D.N.Y. 2005); *United States v. Forbes*, No. 3:02 CR 264, at 13-14 (D. Conn. 2007).

Response to Gov. Req. No. 5: Defendants object to Gov. Req. No. 5, and offer Def. Req. No. 5 in its place, for the following reasons:

1. The first element of Def. Req. No. 5 specifically requires that the agreement being considered must be the one charged in Count One of the indictment. To convict, the jury must find beyond a reasonable doubt that the specific conspiracy charged in the indictment existed; no other agreement or understanding will support conviction. *See, e.g., Russell v. United States*, 369 U.S. 749, 770 (1962); *Stirone v. United States*, 361 U.S. 212, 217 (1960); U.S. Const. Am. 5 (grand jury indictment clause).

2. The second element of Def. Req. No. 5 includes the requirements that the defendant join the conspiracy willfully and with the requisite intent to commit the object offense(s). *See United States v. Salameh*, 152 F.3d 88, 145 (2d Cir. 1998) ("It is well settled that the essential elements of the crime of conspiracy are: . . . (2) the defendant knowingly participated in the conspiracy with the specific intent to commit the offenses that were the objects of the conspiracy . . . ."). The third and fifth paragraphs second element and the last paragraph of Gov. Req. No. 5 omit the "willfully" element, 1 Sand Instr. 19-3, as well as the requirement of the requisite intent to commit the object offenses.

3. Following Sand Instr. 19-3, Def. Req. No. 5 breaks out into separate elements the requirement of an overt act listed in the indictment, and the requirement that the overt act have been committed in furtherance of the conspiracy. Having just one overt act element, as in Gov. Req. No. 5, risks the jury overlooking the independent requirements that the overt act have been both during and in furtherance of the conspiracy.

4. Def. Req. No. 5 adds the requirement that the overt act found by the jury have been committed within the statute of limitations. *See, e.g., United States v. Salmonese*, 352 F.3d 608, 614 (2d Cir. 2003) (citing *Grunewald v. United States*, 353 U.S. 391, 396-97 (1957)); *see also* 1 Sand Instr. 19-7 (citing *Fiswick v. United States*, 329 U.S. 211, 216 (1946)). The statute of limitations is addressed further in Def. Req. No. 9, *infra* (following 1 Sand Instr. 19-7). .

The Defendants object to Government Request No. 6, and in its place offer the following instruction.

DEFENSE REQUEST NO. 6

Count One: Conspiracy – First Element (Existence of Unlawful Agreement)

The first element which the government must prove beyond a reasonable doubt to establish the offense of conspiracy is that two or more persons entered the unlawful agreement charged in Count One of the indictment. That Count alleges that the defendants conspired with one another and with others to commit securities fraud, to make false and misleading statements to the SEC, to make false and misleading statements to auditors, and to falsify Duane Reade's books and records in order to mislead stock market analysts, Duane Reade shareholders, the private equity firm Oak Hill, and the investing public into believing that Duane Reade's financial performance was materially stronger than it actually was by fraudulently inflating income and reducing expenses.

In order for the government to satisfy this element, you need not find that the alleged members of the alleged conspiracy met together and entered into any express or formal agreement. Similarly, you need not find that the alleged conspirators stated, in words or writing, what the scheme was, its object or purpose, or every precise detail of the scheme or the means by which its object or purpose was to be accomplished. What the government must prove is that there was a mutual understanding, either spoken or unspoken, between two or more people to cooperate with each other to accomplish an unlawful act, as charged in Count One of the indictment.

You may, of course, find that the existence of an unlawful agreement to disobey or disregard the law, as charged in Count One of the indictment, has been established by direct proof. However, since conspiracy is, by its very nature, characterized by secrecy, you may also infer its existence from the circumstances of this case and the conduct of the people involved.

In a very real sense, then, in the context of conspiracy cases, actions often speak louder than words. In this regard, you may, in determining whether an unlawful agreement existed here, consider the actions and statements of all of those you find to be participants in the alleged conspiracy as proof that a common design existed on the part of the persons charged to act together to accomplish an unlawful purpose, as charged in Count One of the indictment.[1]

Response to Gov. Req. No. 6: Defendants object to Gov. Req. No. 6, and offer Def. Req. No. 6 in its place, for the following reasons:

1. Def. Req. No. 6 more faithfully tracks the Sand model instruction.

2. The first paragraph of Def. Req. No. 6, unlike Gov. Req. No. 6, ties this instruction specifically to the conspiracy charged in Count One of the indictment. No agreement or understanding other than that described in the indictment will support conviction. *See, e.g., Russell v. United States*, 369 U.S. 749, 770 (1962); *Stirone v. United States*, 361 U.S. 212, 217 (1960); U.S. Const. Am. 5 (grand jury indictment clause).

3. The ideas repeated in the second and third paragraphs of Gov. Req. No. 6—that the gist of the crime of conspiracy is the agreement to violate the law, which is separate and independent from actual commission of the crime—have already been covered in Def. Req. No.

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[1] Adapted from 1 L. Sand, et al., Modern Federal Jury Instructions, Instr. 19-4 (2007) and Indictment ¶¶ 1-44; *see also United States v. Treacy*, No. 1:08-cr-366 (S.D.N.Y. 2009); *United States v. Ebbers*, No. 02-cr-144 (S.D.N.Y. 2005).

3 (or, if given, Gov. Reqs. No. 2 and 3). In addition, the element of agreement is repeated in both parties' Req. No. 5 (elements of conspiracy) and in the first sentence and the second and third paragraphs of Def. Req. No. 6. This language is not contained in the Sand model, Instr. 19-4. Further repetition of these points as in the second and third paragraphs of Gov. Req. No. 6 would be cumulative and unduly emphatic in favor of the prosecution.

4. The ideas contained in the fourth, fifth, sixth, and seventh paragraphs of Gov. Req. No. 6—including that direct evidence of an express agreement is not required, that understandings may be unexpressed, that actions speak louder than words, and that agreement or understanding may be inferred from conduct—are covered in the second, third and fourth paragraphs of the Sand model instruction (Instr. 19-4; Def. Req. No. 6), with less repetition and more even-handedness than in Gov. Req. No. 6.

The Defendants object to Government Request No. 7, and in its place offer the following instruction.

DEFENSE REQUEST NO. 7

Count One: Conspiracy – Objects of the Conspiracy

The objects of a conspiracy are the illegal goals the alleged co-conspirators are charged with agreeing to achieve. The indictment here charges that there were four objects, or goals, of the alleged conspiracy: (1) to commit securities fraud; (2) to make or cause to be made false and misleading statements in reports required to be filed with the SEC; (3) to make or cause to be made false and misleading statements to auditors; and (4) to falsify and cause to be falsified the books, records, and accounts of Duane Reade.

I will now review with you the elements of each of these objects.

Object 1: Securities Fraud

Object 2: False and Misleading Statements to the SEC

I will instruct you on the elements of securities fraud and false statements in SEC filings when I get to the other counts of the indictment that charge those offenses. You must consider my instruction on those elements both as to whether the government has proven they were objects of the alleged conspiracy charged in Count One, and whether the government has proven they were committed as individual offenses charged in Counts Two through Five.

Object 3: False and Misleading Statements to Auditors

The third object, false and misleading statements to auditors, is not charged as a separate count in the indictment. You are to consider it only to determine whether it was an object or goal of the alleged conspiracy.

The law prohibits directors or officers of a corporation that has publicly traded securities from making or causing to be made materially false or misleading statements to an accountant either in connection with an audit or examination of the company's financial statements or in connection with the preparation and filing of documents with the SEC.

To prove this object, the government must prove that two or more persons agreed that the directors or officers of a public company would make or cause to be made a materially false or misleading statement, or to cause those directors or officers to omit to state, or cause another to omit to state, a material fact necessary in order to make the statement made, in light of the circumstances under which such statements were made, not misleading, to an accountant in connection with an audit or examination of the financial statements of the company, or in connection with the preparation or filing of any document or report required to be filed with the SEC. This object has four elements:

First, the government must prove that the statements to accountants that the alleged conspirators agreed upon contained a false statement of fact or omission. A statement is not false merely because subsequent events prove it to have been erroneous. The statement must have been false when it was made.

Second, the government must prove that the alleged false statement of fact or omission that the conspirators agreed upon was "material." If you decide that a particular statement was false when it was made or that a particular omission was made, then you must determine if the fact stated or omission made was a material fact or omission under the evidence in this case. In order for you to find a material fact or omission, the government must prove that the fact misstated or omission was of such importance that it would reasonably be expected to cause or to induce a person to invest or to cause or to induce a person not to invest. A fact or omission is material only if there is a substantial likelihood that a reasonable investor would have viewed the fact or omission as having significantly altered the total mix of information available. You should only be concerned with such material misstatements and omissions and not with minor, meaningless or unimportant ones. Any false statement or omission of material fact must have been material on the date it was made.

Third, the government must prove that the alleged conspirators agreed that the officers or directors would make or cause to be made the materially false or misleading statement, or, in the alternative, that the alleged conspirators agreed that the officers or directors would omit to state or cause others to omit to state the material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading, in connection with audits, reviews and examination of financial statements, or the preparation or filing of documents and reports required to be filed with the SEC. In this regard, it is sufficient to establish this element of the offense if the government proves that the defendant agreed to cause that false statement or omission of material fact to be made by others to accountants in connection with audits, reviews and examinations or the preparation of the company's SEC filings. The defendant may not be held responsible for any false statement or omission to an accountant in connection with audits, reviews and examinations or the preparation of the company's SEC filings if he did not agree to cause the statement to be made.

Fourth, the government must prove that the alleged conspirators agreed that such materially false statements or omissions by the officers or directors would be made knowingly, willfully and with the intent to deceive. The term "knowingly" means to act voluntarily and deliberately, rather than mistakenly or inadvertently. An act is done "willfully" if it is done with knowledge that one's conduct is unlawful and with the intent to do something the law forbids, that is to say, with bad purpose to disobey or disregard the law. This element will not be satisfied if a defendant believed in good faith that the entries to be made were accurate. A defendant, however, has no burden to establish a defense of good faith. The burden is on the government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt. An act is done with the "intent to deceive" if it is done with the intent to mislead another or to cause another to believe that a falsehood is true, but not necessarily for the purpose of causing some financial loss to another.

Object 4: Falsification of Books and Records

The fourth object, falsifying or causing to be falsified the books, records and accounts of Duane Reade, is not charged as a separate count in the indictment. You are to consider it only to determine whether it was an object or goal of the alleged conspiracy.

Federal law requires companies with publicly traded securities to file reports as prescribed by the SEC. These required reports include annual reports on Form 10-K and quarterly reports on Form 10-Q. Public companies that are required to file reports containing financial statements with the SEC must also "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." (15 U.S.C. § 78m(b)(2)(A).) Federal law also provides that "No person shall . . . knowingly falsify any book, record, or account" that is required to be made or kept. 15 U.S.C. §78m(b)(5); *see also* 17 C.F.R. §240.13b2-1.)

To prove this object the Government must prove four elements:

First, that at the time of the alleged offense, Duane Reade was required to file reports with the SEC. I instruct you that companies with publicly traded securities are required to file documents and reports as prescribed by the SEC. Therefore, if you find the government has proved that Duane Reade was a company with publicly traded securities, this would mean that it was required to file reports with the SEC.

Second, the Government must prove that two or more persons agreed to falsify the books, records, or accounts of Duane Reade, or agreed to cause those books, records or accounts to be falsified in a material respect. To satisfy this element, the law does not require that a defendant personally make the false entries in the books, records or accounts. It is enough if he causes or directs others to make such false entries. You must be unanimous as to which defendant, if any, agreed to falsify or cause records to be falsified.

Third, the government must prove that such books, records or accounts were of the type that were required to reflect in reasonable detail the transactions and dispositions of the assets of Duane Reade. Such records include, for example, general ledgers, journal entries, income statements, and account records. You must be unanimous as to which books, records, or accounts the parties agreed to falsify.

Fourth, the government must prove that the alleged conspirators agreed to knowingly and willfully falsify such entries. The term “knowingly” means to act voluntarily and deliberately, rather than mistakenly or inadvertently. An act is done “willfully” if it is done with knowledge that one’s conduct is unlawful and with the intent to do something the law forbids, that is to say, with bad purpose to disobey or disregard the law. This element will not be satisfied if a defendant believed in good faith that the entries to be made were accurate. A defendant, however, has no burden to establish a defense of good faith. The burden is on the government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt.

* * * * *

The government is not required to prove that there was an agreement to commit every one of the objects I have described to you. But the government must prove beyond a reasonable doubt that there was an agreement to accomplish at least one of these unlawful objectives charged in Count One, and you must agree unanimously that it was the same unlawful objective. It is not enough to satisfy this element of the offense if some of you find that the government has proven an agreement to accomplish one unlawful objective while others of you find that the government has proven only an agreement to accomplish a different unlawful objective. If you do not agree unanimously that the government has proven beyond a reasonable doubt an agreement to accomplish the same unlawful objective with respect to at least one of the four objects of the conspiracy charged in the indictment, you must return a verdict of not guilty with respect to Count One.[1]

Response to Gov. Request No. 7: Defendants object to Gov. Req. No. 7, and in its place offer Def. Request No. 7, for the following reasons:

1. *First Paragraph:* Defendants object that the first sentence of Gov. Req. No. 7, regarding the "illegal goals the co-conspirators agree or hope to achieve," is unduly prejudicial because it could suggest prejudgment of guilt, *i.e.*, that the defendants in fact were co-conspirators and agreed or hoped to achieve illegal goals. Moreover, the essence of conspiracy is agreement—the co-conspirators must *agree*, not merely hope, to commit illegal conduct. Defendants thus propose that the first sentence instead refer to "the illegal goals the alleged co-conspirators are charged with having agreed to achieve."

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[1] Adapted from *United States v. Ebbers*, No. 02-cr-144 (S.D.N.Y. 2005), and *United States v. Forbes*, No. 3:02 CR 264, at 15-17 (D. Conn. 2007) (as conformed to the object offenses alleged in this case); *see also United States v. Treacy*, No. 1:08-cr-366 (S.D.N.Y. 2009). The language from those charges has been further adapted in some instances to conform to the language proposed in Gov. Req. No. 7.

For the definition of "willfully" in this instruction, *see* 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 3A-3 (2009). The Government concurs with this definition. *See* Gov. Req. No. 15 (third paragraph).

The final paragraph regarding the need for unanimity is adapted from *United States v. Ebbers*, No. 02-cr-144 (S.D.N.Y. 2005) ("An agreement to accomplish any one of these objects is sufficient. However, you must all unanimously agree on which specific object the conspirators agreed to try to accomplish."); *see also* 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 9-7A (2009). "Instruction 9-7A has been drafted for conspiracy counts, but may be adapted when other crimes are charged requiring this augmented unanimity charge." *Id.*, Comment to Instr. 9-7A; *see also* the cases collected in the Sand, Comment to Instr. 9-7A.

2. *Second and Third Paragraphs—Unanimity As to Object*: The idea covered in the second and third paragraphs of Gov. Req. No. 7—that the jury need not find all the object offenses, but must find at least one of them—is covered in the last paragraph of Def. Req. No. 7. Defendants agree in substance with the point, and take no position on whether the point should be addressed before or after the discussion of the elements of the four object offenses.

However, to find a conspiracy to commit an offense against the United States, the jury must be unanimous as to what offense was the object of the conspiracy. *See United States v. Helmsley*, 941 F.2d 71, 91 (2d Cir. 1991) (endorsing "Judge Walker's careful charge regarding unanimity on [the conspiracy] Count," which instructed that "you all must agree on the specific object the defendant agreed to try to accomplish"); 1 Sand Instr. 9-7A and Comment thereto (collecting cases, including *Helmsley*); *see also* charge in *United States v. Ebbers*, No. 02-cr-144-BSJ (S.D.N.Y. 2005) ("An agreement to accomplish any one of these objects is sufficient. However, you must all unanimously agree on which specific object the conspirators agreed to try to accomplish."). Whether it comes before or after the rest of the instruction, this instruction should include the instruction on unanimity contained in the last paragraph of Def. Req. No. 7.

3. *First Two Objects: Securities Fraud and False Statements in Securities Filings*: Because the first two charged objects of the conspiracy—securities fraud, and false statements to the SEC—are charged as substantive offenses in the indictment, Defendants respectfully submit that instructing on the elements of those offenses here would be time-consuming, distracting, and potentially confusing. Doing so in abbreviated form, as Gov. Req. No. 7 attempts to do, would potentially leave even more room for confusion or for potential misstatement of the law.

As will be seen in the parties' proposed instructions on the substantive offense of securities fraud (Req. No. 14, *infra*), Defendants have significant substantive differences with the Government regarding the elements of that offense. Defendants further object that the instructions on securities fraud and false statements to the SEC in Gov. Req. No. 7 are inaccurate and incomplete. For instance, neither of the instructions on these offenses contained in Gov. Req. No. 7 contains instructs on the *mens rea* elements of these offenses (knowingly, willfully, and with intent to deceive for securities fraud; knowingly and willfully for false statements to the SEC). *See* Gov. Requests to Charge at pp. 13-15. It will be most efficient and least confusing, for the parties, the Court, and the jury, to resolve differences as to instructions on these offenses only once, in the substantive instructions, and to incorporate those instructions here by cross-reference.

Thus, for brevity and clarity, we propose simply instructing the jury to apply the same instructions for the elements of those offenses that it will receive later regarding the substantive charges. *See* Def. Req. No. 7, *supra* (third full paragraph).

4. *Third Object: False Statements to Auditors*:

(a) Because False Statements to Auditors is charged only as an object of the conspiracy, and not as a substantive offense, the jury should be instructed that it may consider this offense only as an object of the charged conspiracy.

(b) The offense of False Statements to Auditors has four elements: (1) a false statement or omission to an accountant; (2) materiality; (3) that officers or directors of the public company made the statement, or caused it to be made, to an accountant in connection with audits, reviews, or examinations of financial statements; and (4) that the defendant did so knowingly, willfully, and with the intent to deceive. Def. Req. No. 7 instructs on these elements; Gov. Req. No. 7 omits discussion of these elements. (Gov. Req. No. 7 attempts to cross-reference earlier discussions of falsity and materiality in connection with its abbreviated instructions on securities fraud and false statements to the SEC. Because those abbreviated instruction on those elements are incomplete, confusing, and misleading, and because the Defense proposes instead cross-referencing the instructions on the substantive offenses (and false statements to auditors is not charged as a substantive offense), it is necessary to instruct on the elements of the false statements to auditors offense here.

5. *Fourth Object: False Books and Records*

(a) Because False Books and Records is charged only as an object of the conspiracy, and not as a substantive offense, the jury should be instructed that it may consider this offense only as an object of the charged conspiracy.

(b) The offense of False Books and Records has four elements: (1) that the company was required to file reports with the SEC; (2) that the defendant you are considering falsified the books records or accounts of the company; (3) that such books, records, or accounts were of the type that were required to reflect in reasonable detail the transactions and dispositions of the assets of the company; and (4) that the defendant agreed to falsify the entries knowingly and willfully. The Government's proposed instruction does not instruct on the fourth element, regarding *mens rea*. Nor does the Government's proposed instruction require the jury to find that the falsified books, records, or accounts were of the type required to reflect in reasonable detail the company's transactions and dispositions of assets. Instead, the Government's proposed instruction uses a broad statutory definition of "records" in such a way as to obviate this requirement, by suggesting that any falsification in any way of any "account, correspondence, memorandum[], tape[], disc[], paper[], book[], [or] other document[] or transcribed information of any type, whether expressed in ordinary or machine language," no matter how tangential or inconsequential, satisfies the requirement.

In sum, Defendants submit that Def. Req. No. 7 contains a more accurate and complete instruction on the elements of the object offense of False Books and Records.

6. *Unanimity as to Object Offense*: Again, as stated earlier, the jury should be instructed that it must be unanimous as to which object offense it finds. *See* last paragraph of Def. Req. No. 7; 1 Sand Instr. 9-7A and comment (collecting cases, including *United States v. Helmsley*, 941 F.2d 71, 91 (2d Cir. 1991)).

The Defendants object to Government Request No. 8, and in its place offer the following instruction.

DEFENSE REQUEST NO. 8

Count One: Conspiracy – Second Element (Membership In The Conspiracy)

The second element of conspiracy that the government must prove beyond a reasonable doubt to establish the offense of conspiracy is that each defendant knowingly, willfully, and voluntarily became a member of the alleged conspiracy, and did so with the requisite unlawful intent.

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In connection with this second element of the alleged offense, I am going to instruct you on the concepts of "knowingly" and "willfully"; second, on the concept of "requisite intent"; and third, on the concept of "good faith."

The question of whether a person acted knowingly, willfully and with the requisite intent is a question of fact for you to determine, like any other fact question. This question involves one's state of mind.

A person acts "knowingly" when he acts voluntarily and purposefully, and not because of ignorance, mistake, accident or carelessness.

An act is done "willfully" if it is done with knowledge that one's conduct is unlawful and with the intent to do something the law forbids, that is to say, with bad purpose to disobey or disregard the law. It is not necessary for the government to prove beyond a reasonable doubt that each defendant knew that he was breaking any particular law or rule, but the government must prove beyond a reasonable doubt that each defendant was aware of the generally unlawful nature of his acts.

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In deciding whether each defendant was, in fact, a member of the conspiracy, you must consider whether each defendant knowingly and willfully joined the conspiracy, intending to advance or achieve its goals. Did he participate in the conspiracy with knowledge of its unlawful purpose and with the specific intention of furthering its objective?

In that regard, it has been said that in order for a defendant to be deemed a participant in a conspiracy, he must have had a stake in the venture or its outcome. You are instructed that, while proof of a financial interest in the outcome of a scheme is not essential, if you find that each defendant had such an interest, that is a factor which you may properly consider in determining whether or not that defendant was a member of the conspiracy charged in the indictment.

It is important for you to note that each defendant's participation in the alleged conspiracy must be established by independent evidence of his own acts or statements. You may also consider, but you may not exclusively rely on, acts or statements of the other alleged co-conspirators, and the reasonable inferences which may be drawn from them.

The extent of a defendant's participation has no bearing on the issue of a defendant's guilt. A conspirator's liability is not measured by the extent or duration of his participation. Indeed, each member may perform separate and distinct acts and may perform them at different times. Some conspirators play major roles, while others play minor parts in the scheme. An equal role is not what the law requires. In fact, even a single act may be sufficient to draw a defendant within the ambit of the conspiracy.

I want to caution you, however, that a defendant's mere presence at the scene of the alleged crime does not, by itself, make him a member of the alleged conspiracy. Similarly, mere association with one or more members of the alleged conspiracy does not automatically make any defendant a member. A person may know, supervise, work for or with, or be friendly with a member of a conspiracy, without being a conspirator himself. Mere similarity of conduct or the fact that individuals may have worked together and discussed common aims and interests does not make them members of a conspiracy.

I also want to caution you that mere knowledge or acquiescence, without participation, in the unlawful plan does not make a defendant a member of the conspiracy. Moreover, the fact that the acts of a defendant, without knowledge, merely happen to further the purposes or objectives of a conspiracy does not make him a member of the conspiracy. More is required under the law. What is necessary is that each defendant must have participated with knowledge of at least some of the purposes or objectives of the conspiracy and with the intention of aiding in the accomplishment of those unlawful ends.

The government is not required to prove that the members of the alleged conspiracy were successful in achieving any or all of the objects of the conspiracy.

In order to prove that a defendant became a member of the alleged conspiracy to commit a particular object offense, the government must also prove, beyond a reasonable doubt, that that defendant acted with the same unlawful intent that must be proven with respect to that alleged object of the alleged conspiracy. If you find that the government has failed to establish that a defendant acted with the unlawful intent needed to commit a particular object offense, you must find that defendant not guilty with respect to the charge of conspiracy to commit that offense.

Securities fraud, which is the first object of the alleged conspiracy, requires that the government prove beyond a reasonable doubt that each defendant acted knowingly, willfully, and with the intent to defraud Duane Reade's shareholders. In order to prove that a defendant became a member of the alleged conspiracy with respect to the object offense of securities fraud, the government must prove beyond a reasonable doubt, in addition to the other elements of membership that I have described, that that defendant acted knowingly, willfully, and with the intent to defraud Duane Reade's shareholders.

"Intent to defraud": in the context of the securities laws, an act is done with the intent to defraud if it is done knowingly with the intent to deceive or defraud.

Making or causing to be made false statements in reports required to be filed with the SEC, which is the second object of the alleged conspiracy, requires that the government prove beyond a reasonable doubt that each defendant acted knowingly, willfully, and with the intent to deceive. In order to prove that a defendant became a member of the alleged conspiracy with respect to the object offense of making or causing to be made false statements in reports required to be filed with the SEC, the government must prove beyond a reasonable doubt, in addition to the other elements of membership that I have described, that that defendant acted knowingly, willfully, and with the intent to deceive.

"Intent to deceive": an act is done with the intent to deceive if it is done with the intent to mislead another or to cause another to believe that a falsehood is true, but not necessarily for the purpose of causing some financial loss to another.

The third object of the alleged conspiracy is making or causing to be made material false statements to auditors, or in the alternative, omitting to state or causing others to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading. This object requires that the government prove beyond a reasonable doubt that the defendant acted knowingly, willfully, and with the intent to deceive. In order to prove that the defendant became a member of the alleged conspiracy with respect to this object offense, the government must prove beyond a reasonable doubt, in addition to the other elements of membership that I have described, that the defendant acted knowingly, willfully, and with the intent to deceive.

Falsifying or causing to be falsified the books, records, and accounts of Duane Reade, which is the fourth object of the alleged conspiracy, requires that the government prove beyond a reasonable doubt that each defendant acted knowingly and willfully with the intent to do something the law forbids. In order to prove that a defendant became a member of the alleged conspiracy with respect to the object offense of falsifying or causing to be falsified the books, records, and accounts of Duane Reade, the government must prove beyond a reasonable doubt, in addition to the other elements of membership that I have described, that that defendant acted knowingly and willfully with the intent to do something the law forbids.

"Intent to do something the law forbids": an act is done with the intent to do something the law forbids if it is done with bad purpose either to disobey or disregard the law.

Because the government must prove beyond a reasonable doubt that each defendant acted knowingly, willfully, and with the unlawful intent to establish membership in the conspiracy, the good faith of any defendant is a complete defense for that defendant. I will instruct you on the defense of good faith in a moment.[1]

Response to Government Request No. 8: Defendants object to Gov. Req. No. 8, and in its place offer Def. Req. No. 8, for the following reasons:

1. *Definition of "willfully"*: Though Gov. Req. No. 8 purports to instruct on the meaning of both "knowingly" and "willfully," the definition offered instructs only on the absence of mistake, accident, mere negligence, or some other innocent reason—the definition of "knowingly." Gov. Req. No. 8 does not contain the definition of "willfully" that is used elsewhere in both parties' proposed instructions, *i.e.*, that "'Willfully' means to act knowingly and purposely, with an intent to do something the law forbids, that is to say, with bad purpose either to disobey or to disregard the law." Gov. Req. No. 15; *see also* Def. Req. No. 15 (agreeing with this language); *see generally* 1 Sand Instr. 3A-3; *United States v. Ebbers*, No. 02-cr-144 (S.D.N.Y. 2005) (regarding this definition of "willfully"); *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703-05 (2005) (where offense requires two *mens rea* standards (there, "knowingly" and "corruptly"), jury must be instructed on both standards).

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[1] Adapted from *United States v. Ebbers*, No. 02-cr-144 (S.D.N.Y. 2005), and 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 19-6 (2009) (as conformed to the object offenses alleged in this case and to account for multiple defendants); *United States v. Treacy*, No. 1:08-cr-366 (S.D.N.Y. 2009).

2. *Definition of "unlawfully"*: The concept contained in the fifth paragraph of Gov. Req. No. 8 (defining "unlawfully")—that the Government need not prove the defendant knew he was breaking a particular law or rule, but must prove that the defendant "was aware of the generally unlawful nature of his acts"—is contained in fifth paragraph of Def. Req. No. 8 (defining "willfully").

3. *Sixth paragraph of Gov. Req. No. 8*: The sixth paragraph of Gov. Req. No. 8 does not appear in the Sand model (Instr. 19-6), and Defendants object to the entire paragraph.

The idea that knowledge may be inferred from circumstances (first two sentences) has already been covered both in the Court's general instructions on inferences and circumstantial evidence, and specifically in the parties' Request No. 6 (Existence of a Conspiracy). To repeat it here is cumulative and unduly emphatic in favor of the prosecution. The second sentence is also argumentative and unduly suggestive. The third and fourth sentences are argumentative, one-sided, and may be unsupported by the evidence. The third sentence, referring to evidence of "certain acts and conversations . . . with each defendant or in each defendant's presence," refers to evidence not yet shown. The fourth sentence explicitly and one-sidedly argues the Government's theory of guilt, and is inappropriate.

4. *Seventh paragraph of Gov. Req. No. 8*: The requirement that the jury consider whether the defendant knew of the unlawful goal or purpose of the conspiracy is covered in the sixth paragraph of Def. Req. No. 8. The idea in the seventh paragraph of Gov. Req. No. 8 (and the eighth paragraph of Sand Instr. 19-6)—that the defendant need not have known all the details of the conspiracy, or all the members of the conspiracy—is more appropriate to a far-flung conspiracy such as a drug-distribution conspiracy, and is unnecessary here. The significance of a

defendant's financial stake in the conspiracy is addressed in the seventh paragraph of Def. Req. No. 8, which replicates the third paragraph of Sand Instr. 19-6).

5. *Independent evidence of defendant's own acts or statements*: Defendants object to the omission from Gov. Req. No. 8 of the requirement that each defendant's participation in the alleged conspiracy must be established by independent evidence acts of his own acts or statements. *See* Def. Req. No. 8 (eighth paragraph); 1 Sand Instr. 19-6 (fifth paragraph); *cf. Bourjaily v. United States*, 483 U.S. 171, 176-81 (1987).

6. *Remainder of Gov. Req. No. 8*: The ideas covered in the remainder of Gov. Req. No. 8—duration and extent of participation, mere association or presence, necessity of participation with knowledge of at least some of the purposes or objectives and the intention of aiding in their accomplishment—are covered in the ninth through eleventh paragraphs of Def. Req. No. 8 (replicating the seventh through ninth paragraphs of Sand Instr. 19-6). Defendants object to the paragraph beginning "In sum," (tenth paragraph of Gov. Req. No. 8 and Sand Instr. 19-6), and in particular the last sentence of that paragraph, as unnecessary, argumentative, one-sided, and unduly suggestive.

8. *Requisite intent for underlying offenses*: The remainder of Def. Req. No. 8 instructs on the requisite intent to commit the object offense(s). *See United States v. Salameh*, 152 F.3d 88, 145 (2d Cir. 1998) ("It is well settled that the essential elements of the crime of conspiracy are: . . . (2) the defendant knowingly participated in the conspiracy with the specific intent to commit the offenses that were the objects of the conspiracy . . . ."). The courts in *Ebbers* (Judge Jones) and *Treacy* (Judge Rakoff) included instruction on the required underlying intent standards. Defendants object to the omission of such instruction in Gov. Req. No. 8.

The Defendants object to Government Request No. 9, and in its place offer the following instruction.

DEFENSE REQUEST NO. 9

Count One: Conspiracy – Third Element (Commission Of Overt Act)

The third element which the government must prove beyond a reasonable doubt to establish the offense of conspiracy is that at least one of the overt acts charged in the indictment was knowingly committed by at least one of the conspirators, at or about the time and place alleged.

The indictment charges that the following overt acts were committed in the Southern District of New York:

[Read alleged overt acts contained in Paragraphs 44(*l*) through 44(n) of the Indictment.]

In order for the government to satisfy this element, it is not required that all of the overt acts alleged in the indictment be proven. Similarly, you need not find that the defendant you are considering committed the overt act. It is sufficient for the government to show that one of the conspirators knowingly committed an overt act in furtherance of the conspiracy, since such an act becomes, in the eyes of the law, the act of all of the members of the conspiracy.

You are further instructed that the overt act need not have been committed at precisely the time alleged in the indictment. It is sufficient if you are convinced beyond a reasonable doubt that it occurred at or about the time and place stated.

There is a limit on how much time the government has to obtain an indictment. This is called the statute of limitations. For you to find Mr. Cuti guilty of conspiracy, the government must prove beyond a reasonable doubt that at least one overt act in furtherance of the conspiracy was committed by a member of the conspiracy after July 9, 2003; that the overt act was committed while the conspiracy was still in existence; and that Mr. Cuti was in fact a member of the conspiracy at the time of the overt act. For you to find Mr. Tennant guilty of conspiracy, the government must prove beyond a reasonable doubt that at least one overt act in furtherance of the conspiracy was committed by a member of the conspiracy after October 9, 2003; that the overt act was committed while the conspiracy was still in existence; and taht Mr. Tennant was in fact a member of the conspiracy at the time of the overt act.

As I instructed you, the government need not prove all of the overt acts alleged in the Indictment; it is sufficient if it proves beyond a reasonable doubt that at least one of those acts was committed within the statute of limitations and while the defendant you are considering was a member of the conspiracy. However, all of you must agree unanimously that it was the same overt act. It is not enough to satisfy this element if some of you find that the government has proven one overt act, while others of you find that the government has proven a different overt act. If you do not agree unanimously, with respect to at least one of the overt acts charged in the indictment, that the government has proven that specific overt act beyond a reasonable doubt, then you must return a verdict of not guilty with respect to Count One.[1]

[1] Adapted from 1 Sand Instr. 19-7. The last paragraph, regarding the need for unanimity, is adapted from the Court's instructions in *United States v. Forbes*, No. 3:02 CR 264, at 26-27 (D. Conn. 2007).

Response to Gov. Request No. 9:

1. Defendants object to the Government's proposed instruction that the jury may convict based on an overt act not charged in the indictment. Gov. Req. No. 9 (fifth paragraph). Although Second Circuit case law has upheld convictions based on uncharged overt acts against constructive amendment or variance challenges, at least where the failure to charge the overt act did not prejudice the defendant, *e.g.*, *United States v. Salmonese*, 352 F.3d 608, 619 (2d Cir. 2003) (citing *United States v. Frank*, 156 F.3d 332, 337 (2d Cir. 1997), Judge Sand's treatise specifically disapproves so instructing the jury. Addressing a charge similar to the Government's proposal that had been given in *United States v. Shaoul,* 41 F.3d 811, 814 (2d Cir. 1994), the Sand treatise states that "[b]ecause this instruction permits the jury to base a conviction on the commission of a single uncharged overt act, it cannot be recommended." 1 Sand 19-7, Cmt.[1] Thus, the Sand model instruction, adapted above, instructs that the jury must find at least one of the overt acts charged in the Indictment to have proven bbeyond a reasonable doubt.

Defendants submit that permitting conviction where one essential element of the offense is based solely on conduct not charged in the indictment would violate the defendants' Fifth Amendment right to indictment by grand jury and their Due Process and Sixth Amendment rights to notice of the charges against them. *See, e.g.*, *Russell v. United States,* 369 U.S. 749, 770 (1962); *Stirone v. United States*, 361 U.S. 212, 217 (1960). While acknowledging *Salmonese* and *Frank, supra,* Defendants submit the better proposition of law was stated in the

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[1] Because *Shaoul* did not involve a challenge to the portion of the instruction regarding whether the overt act must be charged in the indictment, it is not precedent for this charge.

1807 treason trial of Aaron Burr, where Chief Justice Marshall ruled, “The [defendant] can only be convicted on the overt act laid in the indictment. With respect to this prosecution, it is as if no other overt act existed.” *United States v. Burr*, 25 F. Cas. 55, 172 (C.C.D. Va. 1807). Even if the *Frank* and *Salmonese* convictions were upheld against variance or constructive amendment challenges, the Court should not invite the jury to produce a result in tension with Constitution’s indictment and fair notice requirements. In light of these constitutional concerns, and in light of the Sand model instruction (Instr. 19-7) and Judge Sand’s disapproval of instructing on uncharged overt acts, the jury should be instructed that to convict it must find at least one of the overt acts charged in the indictment.

3. The ideas contained in the remainder of Gov. Req. No. 9—that the Government need not prove all of the overt acts alleged; that the overt act need not have been committed at the precise time alleged; and that the overt act standing alone may be an innocent, lawful act—are covered in Def. Req. 9 (based on Sand Instr. 19-7).

4. *Statute of Limitations*: Defendants object to the omission from Gov. Reqs. No. 9 or 10 of any instruction on the statute of limitations. Def. Req. No. 9 follows Sand Instr. 19-7's recommended instruction on the statute of limitations, and adds the requirement that the overt act have been committed while the defendant was a member of the conspiracy. The applicable dates are different for the two defendants because Mr. Cuti entered into agreements with the Government that tolled the statute of limitations from June 20, 2003 to September 19, 2003. The indictment was filed on October 9, 2008.

Defendants have proposed reading only the overt acts alleged in Paragraphs 44(*l*) through 44(n) of the Indictment because those are the only acts alleged that fall within the statute of imitations, and thus the only overt acts that can satisfy the overt act requirement for the conspiracy count. Although the remainder of the alleged overt acts may be considered, subject to appropriate limiting instruction, for the existence of the conspiracy, they should not be included in the Court's instruction on the overt acts that the jury may consider in order to satisfy the overt act element of guilt. For this purpose, only acts within the statute of limitatiosn may be considered. To read the jury allegations of overt acts outside the statute of limitations would invite confusion and potentially invite a legally erroneous conviction based on an overt act outside the statute of limitations.

5. *Unanimity*: The jury must agree unanimously on which overt act was committed. *See United States v. Helmsley*, 941 F.2d 71, 91 (2d Cir. 1991) (endorsing "Judge Walker's careful charge regarding unanimity on [the conspiracy] Count," which instructed that "you all must agree on the specific object the defendant agreed to try to accomplish"); 1 Sand Instr. 9-7A and Comment thereto (collecting cases, including *Helmsley*); *see also* charge in *United States v. Ebbers*, No. 02-cr-144-BSJ (S.D.N.Y. 2005) ("An agreement to accomplish any one of these objects is sufficient. However, you must all unanimously agree on which specific object the conspirators agreed to try to accomplish."). Thus, we have added a unanimity instruction, based on the similar instruction given in *United States v. Forbes*, 3:02 CR 264, at 26-27 (D. Conn. 2007).

The Defendants object to Government Request No. 10, and in its place offer the following instruction.

DEFENSE REQUEST NO. 10

Count One: Conspiracy – Fourth Element (Furtherance of the Conspiracy)

The fourth, and final, element which the government must prove beyond a reasonable doubt is that the overt act was committed, during the period of the alleged conspiracy, for the purpose of carrying out the alleged unlawful agreement.

In order for the government to satisfy this element, it must prove, beyond a reasonable doubt, that at least one overt act was knowingly and willfully done during the period of the alleged conspiracy, by at least one alleged conspirator, in furtherance of some object or purpose of the conspiracy charged in the indictment. In this regard, you should bear in mind that the overt act, standing alone, may be an innocent, lawful act. Frequently, however, an apparently innocent act sheds its harmless character if it is a step in carrying out, promoting, aiding or assisting a conspiratorial scheme. You are therefore instructed that the overt act does not have to be an act which in and of itself is criminal or constitutes an objective of the conspiracy.[1]

Response to Gov. Req. No. 9 and 10: Defendants offer Defense Request No. 10 in place of Government Request No. 10 for two distinct reasons:

1. Defendants object to the failure of the Government's Requests to charge furtherance of the conspiracy as a separate element, as the *Sand* model recommends. *See* 1 Sand

[1] 1 Sand Instr. 19-8.

Instr. 19-3; Def. Req. No. 5, *supra*, esp. Obj. No. 3 to Gov. Instr. No. 5. Although the "in furtherance" requirement is mentioned in Gov. Req. No. 9 and again obliquely in the last line of Gov. Req. No. 10, Defendants submit that it should be broken out as a separate element, and should be the subject of a separate instruction, as the Sand model instructions suggest. *See* 1 Sand Instrs. 19-3, 19-8.

2. Again, Defendants object to the Government's failure to include, in either Gov. Req. No. 9 or Gov. Req. No. 10, an instruction on the statute of limitations. Defendants have offered a statute of limitations instruction in Def. Req. No. 9, *supra*.

The Defendants object to Government Request No. 11, and in its place offer the following instruction.

DEFENSE REQUEST NO. 11

Count Two: Securities Fraud – The Nature of the Offenses Charged, and the Governing Statutes and Regulation

Count Two of the indictment charges that Mr. Cuti and Mr. Tennant violated 17 C.F.R. § 240.10b-5, 15 U.S.C. §§ 78j(b) and 78ff, and 18 U.S.C. § 2, by knowingly and willfully (1) employing a scheme to defraud, (2) making untrue statements and omissions of material facts, and (3) engaging in acts which operated as a fraud upon purchasers and sellers of Duane Reade securities and members of the investing public.

Section 78j(b) of Title 15 of the United States Code provides, in part, that:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . .
>
> (b) [t]o use or employ, in connection with the purchase or sale of any security . . . any . . . deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b).

Section 78ff of Title 15 of the United States Code provides in part:

> (a) Willful violations; false and misleading statements
>
> Any person who willfully violates any provision of this chapter . . . or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or

> regulation thereunder . . . which statement was false or misleading with respect to any material fact . . .

shall be guilty of a crime against the United States. 15 U.S.C. § 78ff.

Section 240.10b-5 of Title 17 of the Code of Federal Regulations (referred to as "Rule 10b-5") provides, in part, that it is unlawful

> for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.[1]

Response to Gov. Req. No. 11: Defendants respectfully submit that the first paragraph of Def. Req. No. 11 is a fair and easily understood summary of the charge in Count Two, and urge the Court to give this summary rather than to read Count Two of the Indictment, which, though not long, is stilted and potentially confusing to the jury.

Government Request No. 11 quotes statutory language, "manipulative or deceptive device or contrivance" in 15 U.S.C. § 78j(b). "Manipulative," however, is a term of art in the securities laws referring to market manipulation, which is not charged in this case. *See, e.g.*, *Santa Fe Indus. v. Green*, 430 U.S. 462, 471-74 (1977). Defendants object to the inclusion of that term in the instructions, which could lead to jury confusion and potentially to conviction for conduct not charged in the indictment.

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[1] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 3-9 (2009); *United States v. Ebbers*, No. 02-cr-144 (S.D.N.Y. 2005); and Indictment ¶ 46.

Government Request No. 11 fails to cite 15 U.S.C. § 78ff, one of the statutes underlying the criminal charge in Count Two. The statute and regulation cited in Gov. Req. No. 11 (15 U.S.C. § 78j(b) and Rule 10b-5) do not by themselves define the criminal offense—they establish the statute's substantive prohibition, but not its criminal penalty. It is §78ff(a) that makes a willful violation of §78j(b) and Rule 10b-5, or a willful and knowing false statement in a securities filing, a crime. See § 78ff(a). Defendants object to the omission of §78ff from the instruction.

The Defendants object to Government Request No. 12 in its entirety.

GOVERNMENT REQUEST NO. 12

Count Two: Securities Fraud – Statutory Purpose

Response to Gov. Req. No. 12: Defendants object to Gov. Req. No. 12 in its entirety. An instruction on the purpose of the statute is unnecessary, one-sided, argumentative, and undermines the presumption of innocence.

The purpose of the statute does not alter the elements of the offense as defined by the statute and as set out in the Court's further instructions. To instruct the jury on the statute's purpose, when such purpose or instruction is not necessary to evaluating guilt or innocence, is unnecessarily suggestive—it suggests that the law needs to be enforced and that the way to do so is to convict and punish these Defendants.

Gov. Req. No. 12 appeals to jurors' urge to enforce the law, but gives them no information about what they are required to find to convict or acquit on this charge. Its discussion of "deceptive and inequitable practices" and "manipulative practices that tend to distort the fair and just price of stock" are unnecessarily and unduly suggestive. And the proposed instruction contains no balancing language reminding the jury that it must begin with the presumption that no crime has been committed.

The Defendants consent to Government Request No. 13 with one objection/modification.

REQUEST NO. 13

Count Two: Securities Fraud – The Elements of the Offense

Response to Gov. Req. No. 13: In the last paragraph of the proposed instruction, beginning "Third," the Government omitted the word "knowingly" in "the defendant knowingly used, or caused to be used . . . ." *See* 3 Sand Instr. 57-20. With the inclusion of "knowingly," Defendants consent.

The Defendants object to Government Request No. 14 and in its place offer the following instruction.

DEFENSE REQUEST NO. 14

Count Two: Securities Fraud – First Element (Fraudulent Act)

The first element that the government must prove beyond a reasonable doubt is that in connection with the purchase or sale of Duane Reade securities, the Defendants employed a "deceptive device or contrivance." The relevant regulation sets out three types of prohibited deceptive devices under the statute. To satisfy this element, the government must prove beyond a reasonable doubt that the defendant you are considering did any one or more of the following, as charged in the indictment:

> (a) knowingly employed a device, scheme or artifice to defraud, or
>
> (b) knowingly made an untrue statement of material fact, or omitted to state a material fact which made what was said, under the circumstances, misleading, or
>
> (c) knowingly engaged in an act, practice or course of business that operated, or would operate, as a fraud or deceit upon a purchaser or seller.

It is not necessary for the government to establish all three types of fraudulent conduct. Any one will be sufficient to satisfy this element of the offense. However, you must agree unanimously that the government has proven beyond a reasonable doubt the same type of fraudulent conduct with respect to at least one of these three types of fraudulent conduct.[1] Also, if the only type of fraudulent conduct you unanimously agree the government has proven beyond a reasonable doubt is that a defendant knowingly made an untrue statement of a material fact, or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, then you must be unanimous as to at least one particular untrue statement or omission of a material fact charged in the indictment that you find the government has proven beyond a reasonable doubt.

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[1] *United States v. Ebbers*, No. 02-cr-144-BJS (S.D.N.Y. 2005).

The statute[1] uses the phrase "any . . . deceptive device or contrivance." "Deception" is a term of art in securities law and means to defraud by deliberately making an affirmative misstatement of a material fact. A "device" is simply an invention, or contrivance, or the result of some plan or design. As used in this statute in connection with the purchase or sale of a security, then, a "deceptive device or contrivance" means the formation of some invention, contrivance, plan, or design to trick or deceive, either by a deliberate affirmative misstatement of a material fact or a deliberate omission of a material fact by one who has a legal duty to disclose that fact.

The regulation uses the term "device, scheme, or artifice to defraud."[2] As I mentioned, a "device" is an invention, a contrivance, or the result of some plan or design. A "scheme" is a design or a plan formed to accomplish some purpose. An "artifice" is a deliberate contrivance or plan of some kind. There is nothing about the terms "device," "scheme," or "artifice" which in and of themselves imply anything fraudulent. The terms are plain English words that are neutral.

A "device, scheme, or artifice to defraud" as used in these instructions, however, means the forming of some invention, contrivance, plan, or design to deceive, either by a deliberate affirmative misstatement of a material fact or a deliberate omission of a material fact by one who has a legal duty to disclose that fact.

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[1] Rule 10b-5(b), 17 C.F.R. §78j(b).

[2] Rule 10b-5, 17 C.F.R. §240.10b-5(a).

A statement, representation, claim, or document is false if it is untrue when made and was then known to be untrue by the person making it or causing it to be made. A representation or statement is fraudulent if it was falsely made with the intention to deceive. The concealment of material facts in a manner that makes what is said or represented deliberately misleading may also constitute a false or fraudulent statement under the statute.

The regulation also uses the term "material."[3] If you decide that a particular statement was false when it was made or that a particular omission was made, then you must determine if the fact stated or omission made was a material fact or omission under the evidence in this case. In order for you to find a material fact or omission, the government must prove that the fact misstated or omission was of such importance that it would reasonably be expected to cause or to induce a person to invest or to cause or to induce a person not to invest. A fact or omission is material only if there is a substantial likelihood that a reasonable investor would have viewed the fact or omission as having significantly altered the total mix of information available. You should only be concerned with such material misstatements and omissions and not with minor, meaningless or unimportant ones. Any false statement or omission of material fact must have been material on the date it was made.

The regulation also uses the phrase "a fraud or deceit upon any person."[4] The phrase "fraud or deceit upon any person" also means an attempt to deceive, by a deliberate misstatement of a material fact or a deliberate omission of a material fact by one who has a legal duty to disclose that fact. The government may establish "a fraud or deceit upon any person" if it proves beyond a reasonable doubt that the fraud or deceit employed was of a kind which would cause reasonable investors to rely.

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[3] Rule 10b-5(b), 17 C.F.R. §240.10b-5(b).

[4] Rule 10b-5(c), 17 C.F.R. §240.10b-5(c).

The individuals alleged to be involved in the fraud or deceit need not have sold or purchased securities themselves as long as the fraudulent or deceitful conduct operated against holders of Duane Reade securities and other members of the investing public. By the same token, the government need not prove that a defendant personally made the misrepresentation or that he or she omitted the material fact. It is sufficient if the government establishes that a defendant caused the statement to be made or the fact to be omitted. With regard to alleged misrepresentations or omissions, you must determine whether the statement was true or false when it was made, or in the case of alleged omissions whether the omission was misleading.

The fraudulent or deceitful conduct alleged need not relate to the investment value of the securities involved in this case. The fraudulent or deceitful conduct must, however, relate to the misrepresentation or omission of a material fact.

Finally, it does not matter whether the alleged conduct was successful or not, or if a defendant profited or received any benefits as a result of the alleged scheme. Success is not an element of the crime charged.

You need not find that a defendant actually participated in any securities transaction if the defendant was engaged in fraudulent conduct that was "in connection with" a purchase or sale. The "in connection with" aspect of this element is satisfied if you find that there was some direct nexus or relation between the allegedly fraudulent conduct and a sale or purchase of securities.

It is no defense to an overall scheme to defraud that a defendant was not involved in the scheme from its inception or played only a minor role with no contact with the investors and purchasers of the securities in question. By the same token, the government need not prove that a defendant personally made the misrepresentation or that he omitted the material fact. It is sufficient if the government establishes that a defendant caused the statement to be made or the fact to be omitted.

Again, it is not necessary for the government to establish all three types of fraudulent conduct, but to find guilt, you must unanimously agree that the government has proven at least one of these three types of fraudulent conduct, and you must agree unanimously as to which type of fraudulent conduct, if any, was proven.[5]

Response to Gov. Req. No. 14: Defendants object in large part to Government Request No. 14, and in its place offer Defense Request No. 14, for the following reasons:

1. *Sand Model Instruction 57-21 (2009) and the Supreme Court's 2008 ruling in Stoneridge*: The Government's request is based principally on unpublished jury charges in cases from 1999 and 2001 that long pre-date the Supreme Court's most recent interpretation of the securities fraud statutes in *Stoneridge Investment Partners v. Scientific-Atlanta, Inc.*, 552 U.S.

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[5] The overall instruction is adapted from *United States v. Ebbers*, No. 02-cr-144 (S.D.N.Y. 2005), and 3 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 57-21 (2009). In the third paragraph, the definitions for the terms "device," "scheme," and "artifice" come from a similar charge in *United States v. Forbes*, No. 3:02 CR 264, at 42-46 (D. Conn. 2007).

148 (2008).[1] To the extent the Government relies on Sand model instructions, it has drawn from parts of three different and apparently outdated instructions. *See* Government Requests to Charge at 38 (citing Sand Instrs. 57-18, 57-22, and 57-26). (In the current (2009) version of Sand, Instr. 57-22, cited by the Government, refers to "Churning," an inapplicable concept, and Instr. 57-26, cited by the Government, does not appear.)

By contrast, Defense Request No. 14 is based on the most recent version of 3 Sand Instr. 57-21 (First Element—Fraudulent Act (Classic Fraud) (2009)), and it further takes into account the Supreme Court's landmark 2008 *Stoneridge* ruling (discussed further below). Defense Request No. 14 is also based on adaptations of the Sand model charge in securities fraud cases in 2005 (*Ebbers*) and 2007 (*Forbes*).

2. *The Statutory Requirement of "Deception"*: Defendants object to Gov. Req. No. 14 because it does not instruct the jury that to convict, it must find both deception and materiality–the core prohibitions in the governing statute. *See* 15 U.S.C. §78j(b) (proscribing the use of "any manipulative or deceptive device or contrivance"); 15 U.S.C. §78ff(a) (providing criminal penalties for willful violations of, *inter alia*, Section 10(b), or for making "statement [that is] false or misleading" with respect to any material fact). Instead, by focusing only on the three prongs of the regulation (Rule 10b-5), rather than the statute (Section 10(b)), Gov. Req.

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[1] *See* Government Requests to Charge at 38 (citing *United States v. Weissman*, 01 Cr. 529 (BSJ); *United States v. Goldenberg*, 98 Cr. 974 (MBM) (S.D.N.Y. Dec. 20, 1999); and *United States v. Pignatiello*, S1 96 Cr. 1032 (LBS) (July 14, 1999). The Government's request is also based on an apparent pastiche of outdated Sand model instructions. The Government cites Sand Instrs. 57-18, 57-22, and 57-26, but those do not correspond to the currently applicable Sand model instruction, Instr. 57-21 (First Element-Fraudulent Act (Classic Fraud)). In the current (2009) edition, Instr. 57-18 (titled "The Indictment and the Statute") sets out the statute (§78j(b)) and Rule (10b-5); Instr. 57-22 concerns Churning (not applicable here), and there is no Instr. 57-26.

No. 14 invites the jury to convict if the jury finds that defendants eihter "employed a device, scheme or artifice to defraud," (so-called "scheme liability," *Stoneridge*, 552 U.S. at 159-60), or "engaged in an act, practice or course of business that operated, or would operate, as a fraud or deceit[,]" even if the jury does not find that one or more defendants misrepresented or omitted a material fact.[2]

Government Request No. 14 tracks the language of the regulation (Rule 10b-5) rather than that of the governing statute itself (Section 10(b)). But it is the *statute* that defines the prohibited conduct that may be punished. "Rule 10b-5 encompasses only conduct already prohibited by Sec. 10(b)." *Stoneridge*, 552 U.S. at 157 (citing *United States v. O'Hagan*, 521 U.S. 642, 651 (1997); *see also Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 173 (1994) ("With respect . . . [to] the scope of conduct prohibited by § 10(b), the text of the statute controls," and Rule 10b-5 may not be used to impose liability for "conduct not prohibited by the text of the statute.").

In Section 10(b) (§78j(b)), "Congress prohibited manipulative or deceptive acts in connection with the purchase or sale of securities." *Central Bank*, 511 U.S. at 174; *see also Santa Fe Ind. V. Green*, 430 U.S. 462, 473 (1977). As used in the securities laws, "manipulative" is a term of art designating market manipulation, *Santa Fe*, 430 U.S. at 476-77, which is not charged in thisc ase. Instead, this case is about alleged deception. In whatever form

[2] Defendants make the same objection to the extent that Gov. Req. No. 7, defining the objects of the conspiracy, incorporates the government's definitions of the elements of securities fraud. Defendants propose, however, that for objects of the conspiracy that are also charged as substantive offenses (Securities Fraud and False Statements to the SEC), the instruction describing the objects of the conspiracy merely refer to the definitions of the elements given in the instructions on the substantive offenses. *See* Def. Req. No. 7, *supra*.

it takes, this core statutory prohibition–deceptive acts–contains two irreducible elements: misrepresentation (including omission, if and only if there is a legal duty to speak) and materiality. Any act that does not contain those two elements is not a "deceptive act" prohibited by the statute, §78j(b). *See Stoneridge*, 552 U.S. at 158; *Central Bank*, 511 U.S. at 174 (citing *Santa Fe*, 430 U.S. at 464, and *Chiarella v. United States*, 445 U.S. 222, 234-35 (1980)).

The government's proposed definitions of acts constituting securities fraud include the defendants having "employed a device, scheme or artifice to defraud," or having "engaged in an act, practice or course of business that oeprated, or woudl oeprate, as a fraud or deceit upon a purchaser or seller." Gov. Req. No. 14. These government proposals track prongs (a) and ©) of Rule 10b-5, as do their corresponding model instructions. And indeed, 15 U.S.C. §78ff(a) does punish willful violations of rules and regulations, including Rule 10b-5, promulgated under Section 10(b). The government's proposal and the model instructions, however, do not recognize, as the Supreme Court did in *Stoneridge*, that the conduct prohibited by the regulation cannot extend beyond the outer limits of the conduct proscribed by the statute itself. *See Stoneridge*, 552 U.S. at 157; *Central Bank*, 511 U.S. at 173. Thus, any violation of §78j(b) has as its irreducible minimum the elements of misstatement (including omission if there was a legal duty to speak) and materiality. *Central Bank*, 511 U.S. at 177 (citing *Santa Fe*, 430 U.S. at 473, *and Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976)).

To obtain a conviction under §78j(b), then, the government must show more than simply that a defendant has "employed a device, scheme or artifice to defraud," or that he has "engaged in an act, practice or course of business that operated, or would operate, as a fraud or deceit upon a purchaser or seller." Gov. Req. No. 14. The government must show that the defendant willfully engaged in misrepresentation or omission of a material fact. The broad definitions of "device, scheme or artifice" in Gov. Req. No. 14 would allow the jury to convict based on conduct that did not include misrepresentation and materiality (so-called "scheme liability," *Stoneridge*, 552 U.S. at 159-60). In taht way, it would allow the possibility of conviction for conduct that falls outside the statute's prohibition on deceptive acts.

This does not mean that prongs (a) and ©) of Rule 10b-5 are nullities, reducing Rule 10b-5 to prong (b) (prohibiting material misstatements). To the extent that acts violating prong (a) (device, scheme or artifice to defraud) or prong ©) (practices operating as a fraud or deceit) involve material deception, as they generally will, the acts remain within the prohibition of §78j(b), punishable by §78ff(a). Thus, Defense Request No. 14 retains the structure of the model instruction, instructing on the three prongs of Rule 10b-5 (and largely tracks the same provisions of Goverment Request No. 14 as well). Defense Request No. 14 begins, however, as the Supreme Court instructs, by instructing the jury on the *statutory* offense, which is to employ a "deceptive device." Defense Request No. 14 then, consistent with *Stoneridge* and *Central Bank*, instructs taht any of the three prongs of Rule 10b-5, to be criminally punishable, must contain the core statutory requirement of deception, *i.e.*, misrepresentation (or omission) plus materiality. By requiring these core elements under the statute, Defense Request No. 14 ensures that the jury may not convict for conduct that, though it may fall within the outer definitions of a "device, scheme, or artifice," falls outside §78j(b)'s core prohibition on deceptive acts. *See Stoneridge*, 552 U.S. at 159-60; *Central Bank*, 511 U.S. at 173-74, 177.

3. *"Device, scheme, or artifice"–"ingenious"*: In the definition of "device," "scheme," or "artifice," Defendants further propose replacing the term "ingenious" with

"deliberate." "Ingenious" is a somewhat dated term that is unduly inflammatory. "Deliberate" captures the requisite fraudulent intent in a less inflammatory way.

4. *Unanimity*: Defendants object to the omission from Gov. Req. No. 10 of any instruction on unanimity. Def. Req. No. 10 (fifth paragraph) requires, as did Judge Jones' charge in *Ebbers*, that that the jury be unanimous as to which prong of Rule 10b-5 satisfies the "fraudulent act" element, and, if based on a false or misleading representation or omission, which representation or omission was false or misleading. Where the securities fraud statute and regulation offer at least three different legal predicates for the "fraudulent act" element—a fraudulent device, scheme, or artifice; a false or misleading statement or omission; or an act, practice, or course of business that operated as a fraud or deceit—the defendants' right to a unanimous verdict beyond a reasonable doubt, *e.g.*, *In re Winship*, 397 U.S. 358, 362-63 (1970), entitles them to a unanimous jury determination as to each element of the offense. *See, e.g.*, 1 Sand Instr. 9-7A and commentary (collecting cases); *see also Richardson v. United States*, 526 U.S. 813, 817-18 (1999) (jury must be unanimous as to each element of the offense, though it need not be unanimous as to what "brute facts" satisfy the element); *United States v. Schiff*, 801 F.2d 108, 114-17 (2d Cir. 1984) (although general unanimity instruction may be sufficient in simple or single-count prosecutions, more specific charge may be necessary where the complexity of the charge or the evidence creates danger of jury confusion).

5. *"In connection with"*: The Government's proposed definition of "in connection with," using the words "touched upon," is based on outdated law. The Second Circuit concluded in *Chemical Bank v. Arthur Andersen & Co.*, 726 F.2d 930 (2d Cir. 1984), that the "touching upon" language used by Justice Douglas in *Superintendent of Ins. v. Bankers Life & Cas. Co.*,

404 U.S. 6, 12-13 (1971), was simply a variation of "in connection with," and was not intended to loosen that statutory requirement. *Chemical Bank*, 726 F.3d at 942.

In *Rand v. Anaconda-Ericcson*, 794 F.2d 843 (2d Cir. 1986), the Second Circuit, citing *Chemical Bank*, ruled that " [t]o fall within Section 10(b), misrepresentations must have some *direct pertinence* to a securities transaction." *Id.* at 847 (emphasis added). To reflect this statement of the law, Defense Request No. 14 replaces the outdated "touched upon" language with the instruction that "[t]he 'in connection with' aspect of this element is satisfied if you find that there was some direct nexus or relation between the allegedly fraudulent conduct and some sale or purchase of Duane Reade securities."

Although the "touched upon" formulation is still contained in the Sand model instruction and was used in *Ebbers*, we respectfully urge adherence here to the Second Circuit's approach in *Chemical Bank* and *Rand*.

6. *Materiality*: In the Government's proffered definition of "material fact" on page 37 of the Government's Requests to Charge, Defendants object to the third paragraph, in particular the reference to gullible buyers and the statement that "the securities laws protect the gullible and unsophisticated as well as the experienced investor." *First*, Defendants object that this language is inflammatory and appeals to jurors' emotions, and is unduly suggestive of guilt. *Second*, this language is inaccurate and potentially confusing, and threatens to confuse the jury, in that it distorts the "reasonable investor" standard. Under the securities laws, a statement is "material" if it would have been important to a *reasonable* investor–not a "gullible" investor or an "experienced" one. *Third*, this paragraph is not warranted by the facts of this case. Defendants do not intend to argue lack of materiality because any statements at issue in this case

"would not have deceived a person of ordinary intelligence." This instruction might be appropriate in a case involving questions of "puffery" or hyperbole in marketing statements, or in a penny-stock pump-and-dump case, but it has no relevance to the government's allegations here regarding sophisticated financial conduct allegedly engaged in to manipulate the financial statements of a large publicly traded company.

The Defendants consent in part and object in part to Government Request No. 15, and in its place offer the following instruction.

DEFENSE REQUEST NO. 15

Count Two: Securities Fraud – Second Element (Knowledge, Willfulness, and Intent)

The second element that the government must establish beyond a reasonable doubt is that the defendant you are considering participated in the scheme to defraud knowingly, willfully and with intent to defraud.

"Knowingly" means to act voluntarily and deliberately, rather than mistakenly or inadvertently.

"Willfully" means to act knowingly and purposely, with an intent to do something the law forbids, that is to say, with bad purpose either to disobey or to disregard the law.

"Intent to defraud" in the context of the securities laws means to act knowingly with the intent to deceive or defraud.

The question of whether a person acted knowingly, willfully and with intent to defraud is a question of fact for you to determine, like any other fact question. This question involves one's state of mind.

When I gave you instructions for the existence of and membership in a conspiracy (in Instructions 6 and 8 above), I gave you instructions about how proof of one's state of mind can be established. Those instructions are equally applicable here, but I will not repeat them.

Also, the good faith of a defendant is a complete defense to the charges. A defendant does not have the burden of establishing good faith. The burden is on the government to prove lack of good faith beyond a reasonable doubt. I will instruct you on good faith in greater detail at a later point.

To conclude on this element, if you find that a defendant was not a knowing participant in the scheme or lacked the intent to deceive, you must acquit that defendant. On the other hand, if you find that the Government has established beyond a reasonable doubt not only the first element (a fraudulent act in connection with the sale of Duane Reade stock), but also this second element, that the defendant you are considering was a knowing participant and acted willfully and with intent to defraud, and if the Government also establishes the third element, as to which I am about to instruct you, then you have a sufficient basis upon which to convict that defendant.[1]

Response to Gov. Req. No. 15: The Defense consents to large parts of Government Request No. 15. Defense Request No. 15 is largely a subset of Government Request No. 15, omitting certain parts to which the Defense objects. There are also a few small changes as described below.

1. *First five paragraphs*: The Defense consents to the first five paragraphs of Gov. Req. No. 15. The corresponding paragraphs of Def. Req. No. 15 are identical.

2. *Inferences from circumstantial evidence*: The sixth, seventh, eighth, and ninth paragraphs of Gov. Req. No. 15 concern inferring state of mind from circumstantial evidence. That subject has already been covered both in the Court's general instructions on inferences and

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[1] Adapted from Gov. Req. No. 15, *United States v. Ebbers*, No. 02-cr-144 (S.D.N.Y. 2005), and 3 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 57-24 (2009); *see also* 1 Sand Instr. 3A-3 (2009).

circumstantial evidence, and specifically in the parties' Request No. 6 (Existence of a Conspiracy). (Those topics are repeated again in Gov. Req. No. 8 (if given), to which Defendants have objected in part for repetition. *See* Def. Req. No. 8, response to Gov. Req. No. 8.). To repeat those instructions yet again here would be cumulative, time-consuming, and unduly suggestive of guilt. In place of those paragraphs in the Government's request, the Defense respectfully suggests inserting a cross-reference to the Court's earlier instructions on that topic. *See* sixth paragraph of Def. Req. No. 15 above.

3. *Good Faith*: The Defense agrees with the Government that the jury should be instructed on good faith. *See* Gov. Req. No. 15 (tenth and eleventh paragraphs). However, good faith is a defense to all of the charges in the indictment, not only securities fraud. Accordingly, the Defense has proposed Defense Instr. 20-F, *infra*. To avoid duplication, the Defense respectfully proposes a brief instruction here on good faith (the seventh paragraph of Def. Req. No. 15, above), with a cross-reference to the Court's later full instruction on good faith.

4. *Exception to Good Faith* ("No Ultimate Harm" exception, *Rossomando*): The defense objects to the "no ultimate harm" exception to good faith contained in the eleventh paragraph of Gov. Req. No. 15. The Second Circuit has held that this instruction is reversible error where it is given in the absence of a factual predicate, *i.e.*, if it is given even though no defendant asserts as a defense that he believed the scheme would ultimately work out and no one would lose money in the end. *United States v. Rossomando*, 144 F.3d 197, 201 (2d Cir. 1998). Here, Defendants do not advance any "no ultimate harm" defense, or contend that they believed a deceptive scheme would ultimately work out so no one would lose money. Instead, Defendants contend that they had no fraudulent intent to begin with and did not set out to

deceive anybody. In these circumstances, it is reversible error to instruct on this exception to the good faith defense. *Rossomando*, 144 F.3d at 201-02.

5. *Last paragraph, disjunctive mens rea*: For brevity and clarity, the Defense has combined the last two paragraphs of Gov. Req. No. 15. In the first sentence of the paragraph, the Government proposed that "if you find that a defendant was not a knowing participant in the scheme *and* lacked the intent to deceive, you must acquit . . . ." However, either the lack of knowledge *or* the lack of fraudulent intent would be a defense—either would defeat a necessary element of the offense. Thus, the first sentence of the last paragraph of Def. Req. No. 15 reads, "if you find that a defendant was not a knowing participant in the scheme *or* lacked the intent to deceive, you must acquit . . . ."

6. *Last paragraph, first element of offense ("fraudulent act" in place of "scheme to defraud")*: In the last paragraph of Gov. Req. No. 15 (now the last sentence of Def. Req. No. 15), the Government refers to the first element as "the existence of a scheme to defraud." A scheme to defraud, however, is only the first of three types of fraudulent act enumerated under Rule 10b-5, as explained in the parties' Request No. 14. Moreover, the Government's description of the elements in this paragraph omits the requirement of "in connection with" the sale of Duane Reade stock. Accordingly, the Defense proposes changing the reference to the first element of the offense here as "(a fraudulent act in connection with the sale of Duane Reade stock)."

The Defendants consent to the Government's Request No. 16.

REQUEST NO. 16

Count Two: Third Element – Instrumentality of Interstate Commerce

The Defendants consent to the Government's Request No. 17.

REQUEST NO. 17

Counts Three Through Five: False Statements in Financial Statements

The Defendants object to Government Request No. 18, and in its place offer the following instruction.

DEFENSE REQUEST NO. 18

Counts Three through Five: False Statements to the SEC – The Essential Elements of the Offenses Charged

In order to meet its burden of proof on Counts Three through Five, the government must prove as to each count each of the following four essential elements beyond a reasonable doubt:

First, that the particular Duane Reade SEC report to which that count pertains was required to be filed with the SEC;

Second, that that report contained a false or misleading statement of fact;

Third, that the false or misleading statement of fact was material;

Fourth, that the defendant you are considering made or caused to be made that false or misleading statement of material fact in the SEC report; and

Fifth, that the defendant you are considering acted knowingly, willfully and with the intent to deceive.[1]

Response to Government Request No. 18: Defendants object that the Government's Request No. 18 has improperly collapsed four separate elements of the § 78ff(a) offense (making a statement, falsity, materiality, and *mens rea*) into one element. The Government has offered no support for its proposed instruction. *See* Gov. Req. No. 18 (p. 47 of the Government's Requests to Charge). The commentary to Sand Instr. 36-9, which the Government cites elsewhere (Gov. Req. No. 20, p. 49 of Government Requests to Charge), states that a combined-elements formulation in a false statements prosecution "is not recommended because combining the elements will tend to confuse the issue for the jury." 2 Sand Instr. 36-9, cmt., at 32-27 (Rel. 51B, Dec. 2007) (discussing Ninth Circuit pattern instruction).

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[1] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 3-9 (2009); *United States v. Ebbers*, No. 02-cr-144 (S.D.N.Y. 2005); see also *United States v. Forbes*, No. 3:02 CR 264, at 30 (D. Conn. 2007).

Defendants respectfully urge the Court to instruct the jury, as did the courts in, *inter alia*, *Ebbers* and *Forbes*, that the jury must find each of the elements required under § 78ff(a): (1) a report required to be filed with the SEC; (2) a false or misleading statement in such a report; (3) materiality; (4) that the defendant made the false or misleading statement or caused it to be made; and (5) *mens rea*.

Note regarding the sequence of the elements: the Sand model instruction for false statements, 2 Sand Instr. 36-9, is designed principally for false statement charges under 18 U.S.C. 1001. The sequence of its five elements is: (1) that the defendant made or caused to be made a statement (Instr. 36-10); (2) that the statement was material (Instr. 36-11); (3) that the statement was false or misleading (Instr. 36-12); and (4) that the false statement was knowing and willful (Instr. 36-14); and (5) that the statement was within federal jurisdiction (Instr. 36-15).

A prosecution for false statements to the SEC under Sec. 78ff(a) is analytically nearly identical. But, as reflected in the charges in *Ebbers* and *Forbes*, the sequence of the elements is different. Because of the principal requirement under the statute that the statement be in a required SEC report (which also takes the place of the federal jurisdiction requirement under Sec. 1001), it makes sense to make the first element a required SEC report (*cf.* 2 Sand Instr. 36-

14), and the second element that a statement in the report have been false or misleading (*cf.* 2 Sand Instr. 36-12). The third element is still materiality;[1] but the fourth element is now that the defendant made the statement or caused it to be made (Instr. 36-10). The fifth element is *mens rea* (Instr. 36-13).

[1] The materiality instruction for false statements under Section 1001, Instr. 36-11, does not fit the context of securities fraud and the requirements of *Basic v. Levinson*. Because the Sand instructions for securities fraud do not contain a stand-alone instruction on materiality, Defendants have used an instruction from the O'Malley model instructions (formerly Devitt & Blackmar). *See* Def. Req. No. 20-A, *infra*.

The Defendants consent to Government Request No. 19.

REQUEST NO. 19

Counts Three through Five: False Statements to the SEC – First Element (Required Filings)

The Defendants object to Government Request No. 20, and in its place offer the following instruction.

DEFENDANTS' REQUEST NO. 20

Counts Three through Five: False Statements to the SEC – Second Element (False Statement)

The second element that the government must prove beyond a reasonable doubt is that Duane Reade's SEC report pertaining to the count you are considering contained a false or misleading statement of fact.

A statement is false if it was untrue when made, and known at the time to be untrue by the person making it or causing it to be made. A statement is misleading if it is either an untrue statement as to a material fact or if it omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

Also, as I instructed with respect to Counts One and Two, the good faith of a defendant is again a complete defense to the charges contained in Counts Three through Five. A defendant does not have the burden of establishing good faith. The burden is on the government to prove lack of good faith beyond a reasonable doubt. Again, I will instruct you on good faith in greater detail at a later point.

The government is not required to prove that all of the allegedly false statements were indeed false. However, the government must prove beyond a reasonable doubt that at least one of the specific statements was false, and you must agree unanimously that the same statement was false. It is not sufficient to establish this element of the offense if some of you find that the government has proven one false statement in one Duane Reade filing, while others of you find that the government has proven another false statement in that filing, or a false statement in a different filing. If you do not agree unanimously that the government has proven beyond a reasonable doubt the same specific false statement with respect to at least one of the alleged false statements, you must return a verdict of not guilty with respect to these counts.[1]

Response to Government Request No. 20 regarding the element of False Statement:

1. Defendants renew their objection to the Government's combining this element with the elements of materiality and "made or caused to be made," rather than breaking out all of the separate elements of the offense, as recommended in Sand Instructions 36-9 (elements of a false statements offense) and 36-12 (false statement).

2. The entirety of the Government's proposed instruction regarding a false or misleading statement of fact is a one-sentence definition of the word "false." Gov. Req. No. 20 (second paragraph). Though Defendants do not object to that definition as far as it goes, Defendants object to the omission of the rest of the instructions contained in Def. Req. No. 20 and 2 Sand Instr. 36-4. Specifically:

3. Defendants object to the omission of the definition of "misleading" contained in Def. Req. No. 20 (second paragraph).

4. Defendants object to the omission of any mention of good faith, and the Government's burden to prove lack of good faith beyond a reasonable doubt. *See* Def. Req. No. 20 (third paragraph). Because good faith is a defense to all of the charges in the indictment,

[1] Adapted from *United States v. Ebbers*, No. 02-cr-144 (S.D.N.Y. 2005), including the requirement for unanimity; *see also* 2 Sand Instr. 36-12.

Defendants propose a freestanding Good Faith instruction (Def. Req. No. 20-F), with only a brief mention of good faith here, referring to that later instruction for the details of good faith.

5. Defendants object to the omission of the requirement that the jury agree unanimously that the same statement was false or misleading. *See* Def. Req. No. 20-F (fourth paragraph); *see also* 1 Sand 9-7A and Comment thereto (collecting case law, including cases requiring unanimity as to which statement is false).

The Defendants object to Government Request No. 20 and request the following instruction in addition to the Government's requests.

DEFENSE REQUEST NO. 20-A

Counts Three through Five: False Statements to the SEC – Third Element (Materiality)

The third element that the government must prove beyond a reasonable doubt is that the alleged false or misleading statement of fact in Duane Reade's reports was "material."

If you decide that a particular statement was false or misleading when it was made, then you must determine if the fact stated was a material fact under the evidence in this case. It is not enough to find that a particular statement or omission was inaccurate, misleading or even a "lie" because not all lies are "material" under the securities laws.

In order for you to find a statement or omission material, the government must prove beyond a reasonable doubt that it was substantially likely that a reasonable investor would have considered the statement or omission important in deciding whether to purchase or sell shares of Duane Reade stock. "Important" means that there was a substantial likelihood that a reasonable investor would have acted *differently* if the misrepresentation had not been made or the truth had been disclosed. In deciding whether the fact or omission was "important," you must consider the "total mix" of information made available about Duane Reade. For you to find materiality, the government must prove beyond a reasonable doubt that it was substantially likely that a reasonable investor would have viewed disclosure of the omitted fact as having significantly altered the total mix of information available – in other words, that there was a substantial likelihood that a reasonable investor would have acted differently (in his or her buying and selling decisions) if the alleged misrepresentation had not been made or the truth had been disclosed.

If, on the other hand, you find a reasonable investor would not have considered the fact important to his or her investment decision, or you find disclosure of the omitted fact would not have significantly altered the total mix of information available, the statement or omission is not material.

The statutes under which Counts Three through Five of the indictment are brought are concerned only with such material misstatements and do not cover minor, meaningless, or unimportant ones.[1]

Response to Government Request No. 20 regarding the element of Materiality:

1. Defendants renew their objection to the Government's combining this element with the elements of "false statement" and "made or caused to be made," rather than breaking out the separate elements of the offense, as recommended in Sand Instructions 36-9 (elements of a false statements offense) and 36-11 (materiality).[1]

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[1] Adapted from 2B O'Malley, *et al.*, Federal Jury Practice and Instructions, § 62.14 (5th ed. 2000); *United States v. Ebbers*, No. 02-cr-144 (S.D.N.Y. 2005) (definition for materiality found within securities fraud instructions); *see also United States v. Forbes*, No. 3:02 CR 264, at 35-36 (D. Conn. 2007).

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[1] The materiality instruction for false statements under Section 1001, Instr. 36-11, does not fit the context of securities fraud and the requirements of *Basic v. Levinson*. Defendants have used an instruction from the O'Malley model instructions (formerly Devitt & Blackmar).

2. Defendants object to defining "materiality" merely by reference to an earlier definition in the charge (especially without any cross-reference to the specific instruction, as in Gov. Req. No. 20 (third paragraph)). The charge does not contain an earlier easy-to-find definition of materiality. Instead, earlier definitions of the term are buried in long and complex instructions about the elements of underlying objects of the conspiracy (Def. Req. No. 7, ninth paragraph), or about the multiple prongs of Rule 10b-5 that are relevant to the "fraudulent act" element of securities fraud (Def. Req. No. 14, 10th paragraph). Where the definition is short and manageable, as here, it will be easier and less confusing for the jury to have the definition contained in the instruction on the elements of this offense, without having to hunt for it elsewhere in the charge. The definition here, based on a recognized model instruction (2B O'Malley *et al.*, Fed. Jury Prac. & Instrs. § 62.14 (5th ed. 2000)), is a succinct, fair and accurate definition of "material" under the securities laws. *See, e.g.*, *Basic v. Levinson*, 485 U.S. 224 (1988).

3. In the alternative, if the Court chooses to define materiality by cross-reference to an earlier instruction, Defendants respectfully propose a cross-reference to the earlier definition of materiality in the ninth paragraph of Def. Req. No. 7, or the tenth paragraph of Def. Req. No. 14.

The Defendants object to Government Request No. 20 and request the following instruction in addition to the Government's requests.

DEFENSE REQUEST NO. 20-B

Counts Three through Five: False Statements to the SEC – Fourth Element (Defendant Made the Statement or Caused It to be Made)

The third element that the government must prove beyond a reasonable doubt as to each of Counts Three through Five that you are considering is that the defendant made or caused to be made the alleged false or misleading statement of material fact in the SEC report at issue. In this regard, the Government need not prove that the defendant physically made or otherwise personally prepared the statement in question. It is sufficient to establish this element of the offense if the government proves beyond a reasonable doubt that the defendant caused that false or misleading statement of material fact in the SEC report at issue to be made by others.

The defendant may not be held responsible for any false or misleading statement in an SEC report that he did not make or cause to be made. If the government proves beyond a reasonable doubt that the SEC report at issue in a count of the indictment contained a materially false or misleading statement, but the government fails to prove beyond a reasonable doubt that the defendant made that statement or caused that statement to be made in the SEC report, you must find the defendant not guilty on that count.[1]

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[1] Adapted from *United States v. Ebbers*, No. 02-cr-144 (S.D.N.Y. 2005) and 2 Sand Instr. 36-10; *see also United States v. Forbes*, No. 3:02 CR 264, at 36-37 (D. Conn. 2007).

Response to Government Request No. 20 regarding the element, "Made or Caused to be Made":

1. Defendants renew their objection to the Government's combining this element with the elements of "false statement" and materiality, rather than breaking out the five separate elements of the offense, as recommended in Sand Instructions 36-9 (elements of a false statements offense) and 36-10 (defendant made or caused to be made a statement).

2. Defendants object to the omission from the Government's Request the instruction that if the jury does not find beyond a reasonable doubt that the Defendants made or caused to be made the statement(s) at issue, it cannot convict.

The Defendants object to Government Request No. 20 and request the following instruction in addition to the Government's requests.

DEFENSE REQUEST 20-C

Counts Three through Five: False Statements to the SEC – Fifth Element (Knowingly and Willfully)

The fourth element that the government must prove beyond a reasonable doubt is that the defendant acted knowingly and willfully.

An act is done knowingly if it is done purposely and voluntarily, as opposed to mistakenly or accidentally.

An act is done willfully if it is done with an intention to do something that the law forbids, that is, with a bad purpose to disobey the law.

When I gave you instructions for the second element of conspiracy (*i.e.*, knowingly and willfully becoming a member of the conspiracy and doing so with the requisite intent), I gave you instructions about how proof of one's state of mind can be established. Those instructions are equally applicable here, but I will not repeat them.

Also, the good faith of the defendant is a complete defense to the charges. The defendant does not have the burden of establishing good faith. The burden is on the government to prove lack of good faith beyond a reasonable doubt. I will instruct you on good faith in greater detail shortly.[1]

[1] 2 Sand Instr. 36-13; *see also* Def. Req. Nos. 8 and 15 and supporting authority, *supra*.

Response to Gov. Req. No. 20 regarding the *Mens Rea* element:

1. Defendants object to the omission from Gov. Req. No. 20 of any *mens rea* element. The statute defining the offense, 15 U.S.C. 78ff(a), only punishes false statements made knowingly and willfully.

2. The same *mens rea* applies under the general false statements statute, 18 U.S.C. 1001, and those terms are defined in the model instruction defining the *mens rea* for false statements under that statute, 2 Sand Instr. 36-13.

3. The definitions of "knowingly" and "willfully" are short, easy to reproduce, agreed by the parties, and consistent throughout these instructions. It is easier and less confusing for the jury to repeat them here rather than make the jury follow a cross-reference to an earlier instruction.

The Defendants request the following instruction in addition to the Government's requests.

DEFENSE REQUEST NO. 20-D

Statute of Limitations

The allegations in the Indictment are alleged to have taken place between the years 2000 and 2005. However, both the conspiracy charge in Count One of the Indictment and the substantive offenses charged in Counts Two through Five of the Indictment are subject to the statute of limitations, which is a limit on the time in which the Government can obtain the Indictment. If you find that the government has proven beyond a reasonable doubt any of the charges in the Indictment against a particular defendant, you must also find that at least part of the alleged conduct that satisfies the essential elements of that charge occurred after July 9, 2003 with respect to Mr. Cuti and after October 9, 2003 with respect to Mr. Tennant. If you do not find beyond a reasonable doubt that some of the alleged conduct took place after the dates I just mentioned as to a particular count in the Indictment, and that the defendant you are considering was a member of the conspiracy or scheme charged in that count after that date, you must vote to acquit on that count.[1]

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[1] Adapted from *United States v. Treacy*, No. 1:08-cr-366 (S.D.N.Y. 2009); *see also United States v. Grammatikos,* 633 F.2d 1013, 1022 (2d Cir. 1980) (citing *United States v. Alfonso-Perez,* 535 F.2d 1362, 1364 (2d Cir. 1976)) ("Where the defenses of time-bar or improper venue are squarely interposed, they must be submitted to a properly instructed jury for adjudication."). The date included in the charge is based on the applicable five-year statute of limitations, adjusting for the tolling agreement entered into by the parties. *See* 18 U.S.C. § 3282(a) ("Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.").

The Defendants request the following instruction in addition to the Government's requests.

DEFENSE REQUEST NO. 20-E

“Reciprocal” Transactions & “Round trips”

As part of its allegations, the government has characterized certain reciprocal transactions as fraudulent “round trips.” The term “round trip” does not appear in any of the statutes under which defendants are charged in this case.

Reciprocal transactions between two parties are not fraudulent in and of themselves. Reciprocal transactions involving payments from one party to a second party for assets or services, and payment from the second party to the first for assets or services, may reflect a legitimate, mutually beneficial business relationship. The mere fact that these payments occur, or even that they occur at or about the same time -- standing alone -- does not mean they are fraudulent.

However, reciprocal transactions may be fraudulent if they lack economic substance, and are simply a mechanism for one or both parties to create the false appearance of revenues. Such fraudulent reciprocal transactions are sometimes referred to as “round trips.” For two transactions to constitute a fraudulent “round trip,” they both must lack economic substance, that is, both sides of the alleged round trip must be a sham. In determining whether a particular transaction had economic substance, you are instructed to consider the overall circumstances surrounding the transaction. If either transaction has economic substance, they do not constitute a fraudulent "round trip."[1]

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[1] Adapted from *Teachers' Ret. Sys. v. Hunter,* which held that:

> A typical "round-tripping" scheme involves parties entering into reciprocal contracts to exchange similar amounts of money for similar services. *See, e.g., In re Homestore.com, Inc. Sec. Litig.*, 252 F. Supp. 2d 1018, 1024-25 (C.D. Cal. 2003) (describing the bartering of like services to artificially inflate revenues). Such transactions can be improper because the parties book revenues even though the transactions "wash out" without any economic substance. But the basis for alleging "round-tripping" does not exist when either of the transactions have economic substance because those transactions would not wash out. The mere existence of reciprocal dealing does not suggest "round-tripping." Indeed, it is a common, legitimate, and perhaps useful business practice for one company to invest in the stock of a second company with which it is entering into a major contract for products or services. . . . [If] either transaction has economic sub-stance, the transactions cannot be a wash, and there would be no artificial inflation of revenue. . . . *To be sure, reciprocal contracts without more are not per se fraudulent.*

477 F.3d 162, 178-79, 182 (4th Cir. 2007) (emphasis added); *see also In re Parmalat Sec. Litig.*, 414 F. Supp. 2d 428, 434 n.23 (S.D.N.Y. 2006) (citing *In re Elan Sec. Litig.*, 385 F. Supp. 2d 363, 367 (S.D.N.Y. 2005), and *In re AOL Time Warner, Inc. Sec. & ERISA Litig.*, 381 F. Supp. 2d 192, 226 (S.D.N.Y. 2004)).

The Defendants request the following instruction in addition to the Government's requests.

DEFENSE REQUEST NO. 20-F

Good Faith

In considering the various charges alleged in this case, you must consider whether the defendants acted in good faith. Good faith is a complete and absolute defense to the charges in this case.

Good faith on the part of a defendant is simply inconsistent with the unlawful intent to join a conspiracy. Similarly, good faith on the part of a defendant is a complete and absolute defense to the charges of securities fraud because a defendant who acted in good faith cannot be found to have acted with the unlawful intent to defraud. Finally, good faith on the part of a defendant is a complete and absolute defense to the charge of false statements for the same reason.

If a person holds a good faith belief in the accuracy of a statement, there is no crime. This is so even if he is mistaken and even if the statement is, in fact, materially false. An honest mistake of judgment or negligence is not unlawful intent, and a defendant who acts on such a basis can still be acting in good faith. A person who believes in good faith that his actions comply with the law cannot be found guilty of the crimes charged in this case. Therefore, if a defendant believed that he was acting in accordance with the law, he cannot be found to have acted with the required criminal intent and you must find him not guilty.

A person does not act in "good faith" if, even though he honestly holds a certain opinion or belief, that person also knowingly makes false or fraudulent pretenses, representations, or promises to others.

The burden of proving good faith does not rest with a defendant because a defendant does not have to prove anything in this case. The government has the burden of proving beyond a reasonable doubt that each defendant acted knowingly, willfully, and with the unlawful intent required for the charge you are considering. If the evidence in the case leaves you with a reasonable doubt as to whether a defendant acted in good faith, you must find that defendant not guilty.[1]

Defendants object to the omission from the Government's Requests of a stand-alone good faith instruction:.

Where, as here, "fraudulent intent is an element" of the charged crimes, good faith constitutes an "absolute defense." 1 L. Sand *et al.*, Modern Federal Jury Instructions, Instr. 8-1. A good faith instruction here serves important purposes. First, it clearly instructs the jury that good faith is an absolute defense to the crimes charged, minimizing the chances that the jury will be confused or misled by circumstantial evidence of intent. Second, and similarly, it explains clearly that a defendant cannot be convicted for making an honest mistake. The Second Circuit specifically mandates the use of clear language on this point. *See United States v. Baren*, 305 F.2d 527, 533 (2d Cir. 1962) ("If you believe that the defendants believed in the truth of the representations that they made, then it does not make any difference if the representations were untrue."). Finally, a good faith instruction highlights that it is the government's burden to prove lack of good faith, eliminating the possibility that jurors incorrectly will assume that Defendants arguing their good faith must shoulder the burden to prove good faith.

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[1] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 8-1 (2007); *Id.*, Comment to Instr. 8-1, and *United States v. Ebbers*, No. 02-cr-144 (S.D.N.Y. 2005); *see also United States v. Treacy*, No. 1:08-cr-366 (S.D.N.Y. 2009); *United States v. Forbes*, No. 3:02 CR 264, at 25-26 (D. Conn. 2007).

The second paragraph has been added to specify that the defense applies to each of the offenses, as reflected by the individual instructions given for each count charged in *United States v. Ebbers*, No. 02-cr-144 (S.D.N.Y. 2005).

The Defendants object to Government Request No. 21 and object to any instruction on aiding and abetting. Defendants reserve the right to submit authorities and a proposed instruction if the Court determines that an aiding and abetting charge is permitted and is warranted by the evidence.

REQUEST NO. 21

Aiding and Abetting

Objections to Gov. Req. No. 21:

Objections to any Aiding and Abetting Instruction

Defendants object to an Aiding and Abetting instruction because the evidence will not support a theory of aiding and abetting for either defendant. In addition, aiding and abetting is nowhere mentioned in the indictment (in contrast to willful causation, which is alleged in numerous places). To instruct the jury that it may convict on an aiding and abetting theory not voted by the grand jury would violate the defendants' Fifth Amendment right to Grand Jury Indictment.

The Fifth Amendment guarantees that no person may be convicted for an offense not indicted by a grand jury. U.S. Const. am. 5; *Russell v. United States,* 369 U.S. 749, 760-61 (1962). To protect that right, the indictment must specify the facts constituting the offense, for which probable cause was found by the grand jury. *Russell,* 369 U.S. at 763-64, 770. A defendant may not be convicted for any offense not contained in the indictment. *Id.*; *Stirone v. United States*, 361 U.S. 212, 217 (1960).

The words "aiding and abetting" do not appear in the indictment even once. The only inkling of an aiding and abetting allegation anywhere in the indictment is the citation, following each substantive count, of 18 U.S.C. § 2. That section encompasses the charged willful causation theory, § 2(b), as well as the unmentioned aiding and abetting theory, § 2(a). Because aiding and abetting, unlike willful causation, appears nowhere in the indictment, there is no assurance that aiding and abetting was considered or charged by the grand jury. *See Russell*, 369 U.S. at 763-64 (the indictment must "contain[] the elements of the offense intended to be charged"). Accordingly the government may not obtain a conviction on that theory. *Stirone*, 361 U.S. at 217.

The Second Circuit has held that although charging aiding and abetting in the indictment is preferable, an aiding and abetting charge may be given where warranted by the evidence, whether or not aiding and abetting is charged in the indictment. *E.g.*, *United States v. Taylor*, 464 F.2d 240, 241 n.1 (2d Cir. 1972). Defendants acknowledge this adverse Second Circuit authority, but respectfully submit it is inconsistent with their right to grand jury indictment under the Fifth Amendment, *Russell*, and *Stirone*. *See also United States v. Aaron Burr*, 25 F. Cas. 55, 172 (C.C.D. Va. 1803) (Marshall, C.J.) (defendant may only be convicted for acts specified in the indictment, and for no others). Indeed, even the *Taylor* court stated that charging aiding and abetting in the indictment is the preferable practice. The fact that under *Taylor* the Court *may* instruct on aiding and abetting even though it is not charged in the indictment does not mean the Court in its discretion *should* do so. In any event, *Taylor* permits an aiding and abetting instruction only where one is warranted by the evidence.

Although the Second Circuit *permits* courts to instruct on aiding and abetting even where such a theory is unmentioned in the indictment, it does not *require* courts to do so. This Court has discretion to follow the indictment and the evidence in instructing the jury. Where the government has already amply charged alternative theories of guilt—conspiracy, committing substantive offenses as principals, and willfully causing others to commit such offenses—it should not receive the bonus of a jury instruction on a theory it did not charge and that the evidence will not support.

Specific Objections to Gov. Req. No.21

1. Defendants object to the Government's omission of the "knowingly associated" paragraph in the Sand model instruction (1 Sand Instr. 11-2, fifth paragraph) requiring that the aiding and abetting instruction incorporate the underlying *mens rea* with specific reference to the predicate offense. The fifth paragraph of Sand Instr. 11-2 provides:

> To establish that defendant knowingly associated himself with the crime, the government must establish that the defendant [*describe mental state required for principal offense, e.g.,* knew that drugs were being imported into the United States; intended that [the victim] be murdered, *etc.*].

To conform with this paragraph of the model, an aiding and abetting instruction in this case would have to read, for instance,

> To establish that the defendant you are considering knowingly associated himself with the crime of securities fraud, the government must establish that the defendant knew and intended that some other person, with bad purpose to disobey the law, was employing a deceptive device in connection with the purchase or sale of Duane Reade securities, that is, that some other person, in connection with the purchase or sale of Duane Reade securities, was, with bad purpose to disobey the law, employing a device, scheme, or artifice to defraud, or was making or causing to be

> made some false or misleading statement of material fact, or misleading omission where he had a duty to speak, or was engaging in a pattern, practice, or course of conduct that operated as a fraud or deceit upon buyers or sellers of Duane Reade securities.
>
> Similarly, to establish that the defendant you are considering knowingly associated himself with the crime of false statements to the SEC, the government must establish that the defendant knew and intended that some other person, knowingly and with bad purpose to violate the law, was making or causing to be made, in reports Duane Reade was required to file with the SEC, statements that were false or misleading as to some material fact, or omissions that, in light of the circumstances, were required to make statements in those reports not misleading as to some material fact.

The government has entirely omitted this part of the model aiding and abetting instruction, severing any concrete connection between the defendants and the mental state(s) required for the concrete principal offenses they are accused of aiding and abetting.

2. Defendants further object to the Government's omission of this critical paragraph of the Sand model instruction:

> To establish that the defendant participated in the commission of the crime, the government must prove that defendant engaged in some affirmative conduct or overt act for the specific purpose of bringing about the crime.

1 Sand Instr. 11-2, sixth paragraph. The Government thus has omitted a critical element of the aiding and abetting theory of liability, the element that makes the difference between merely wishing for some crime to be committed by others and taking some concrete step to bring that result about. *See, e.g.*, *United States v. Hamilton*, 334 F.3d 170, 180 (2d Cir. 2003) (requiring that the defendant have "acted with the intent to contribute to the success of the underlying crime").

Without these critical omitted paragraphs of the model instruction, the remainder of this requested charge is abstract and free-floating, threatening to permit conviction if the jury feels *generally* that a defendant wished for the accomplishment of some “criminal venture” (itself a suggestive phrase), without requiring the jury to find beyond a reasonable doubt that the defendant knew and intended to bring about the specific offenses charged in the indictment, and took concrete steps to bring those results about.

The Defendants object to Government Request No. 22, and in its place offer the following instruction.

DEFENSE REQUEST NO. 22

Willfully Causing a Crime

For purposes of this theory of guilt, similar to aiding and abetting, the government does not contend that the defendants on trial here actually committed the substantive offenses of Securities Fraud or False Statements to the SEC, charged in Counts Two and Three through Five of the Indictment, respectively. Instead, the government contends that the defendants caused other people to physically commit those offenses. Section 2(b) of the aiding and abetting statute, which relates to willfully causing a crime, reads as follows:

> Whoever willfully causes an act to be done which, if directly performed by him, would be an offense against the United States, is punishable as a principal.

What does the term "willfully caused mean?" It does not mean that the defendant himself need have physically committed the crime or supervised or participated in the actual criminal conduct charged in the indictment.

For Securities Fraud, as charged in Count Two, the meaning of the term "willfully caused" can be found in the answers to the following questions:

First, did the defendant you are considering act knowingly, willfully, and with intent to defraud, that is: (a) did he know that others were going to employ a deceptive device in connection with purchase or sale of its securities; that is, that others were going to engage in a scheme to defraud, or to make untrue or misleading statements or omissions as to material facts, or to engage in a course of conduct that operated as a fraud or deceit on its investors; (b) did he intend to do something the law forbids, with bad purpose to disobey or to disregard the law; and (c) did he have the purpose of deceiving or defrauding buyers or sellers of Duane Reade stock?

Second, did the defendant you are considering: (a) intentionally cause other people to use a deceptive device in connection with the purchase or sale of Duane Reade stock, that is to say, did he, in connection with the purchase or sale of Duane Reade stock, intentionally cause other people to engage in a scheme to defraud, or to make untrue or misleading statements or omissions as to material facts, or to engage in a course of conduct that operated as a fraud or deceit on Duane Read's investors; *and* did that defendant (b) intentionally cause some other person to knowingly use, or cause to be used, an instrumentality of communication in interstate commerce (*e.g.*, the internet, wire communication facilities, or the mails) in furtherance of such fraudulent scheme or conduct?

For the offense of False Statements to the SEC charged in Counts Three through Five of the Indictment, the meaning of the term "willfully caused" can be found in the answers to the following questions:

First, as to each Count, did the defendant act knowingly, willfully, and with intent to deceive, that is: (a) did he know that the financial information that Duane Reade reported was materially false or misleading; (b) did he intend to do something the law forbids, that is, to act with bad purpose to disobey or to disregard the law; and (c) did he intend to mislead Duane Reade's shareholders or the investing public?

Second, as to each Count. did the defendant intentionally cause other people to make or cause to be made false or misleading statements of material fact in Duane Reade's required reports to the SEC?

For each count you consider, if you are persuaded beyond a reasonable doubt that the answer to both of the questions is "yes," then the defendant is guilty of the crime charged in that count just as if he himself had actually committed it. However, if the answer to one of these questions is "no," or if you have a reasonable doubt as to either answer, then you may not convict that defendant of "willfully causing" the offense.[1]

Objections to Gov. Req. No. 22:

1. Defendants object to the Government's omission from its willfully causing instruction of the sixth and seventh paragraphs of the Sand model instruction (1 Sand Instr. 11-3). As with its proposed aiding and abetting instruction, the Government has omitted the critical paragraph of the Sand model that requires tying the instruction to the required mental state(s) for the specific charged underlying crimes.

The sixth and seventh paragraphs of Sand Instr. 11-3, omitted by the Government, require asking the jury:

> Did the defendant [*describe mental state required for principal offense, e.g.,* know that drugs were being imported into the United States; intend that [the victim] be murdered, *etc.*]?
> Did the defendant intentionally cause another person to [describe requisite act]?

This is the heart of the "willfully causing" instruction. Under these paragraphs, a proper "willfully causing" instruction would have to describe the specific *mens rea* required for each offense charged in the indictment, and would have to ask whether the defendant intentionally

[1] Adapted from 1 L. Sand *et al.*, Modern Federal Jury Instructions, Instr. 11-3 (2009). The last sentence was added to make the instruction's conclusion more balanced between the government and the defendants.

caused another to commit the specific *actus reus* for each charged offense, as set out in the fourth through ninth paragraphs of Def. Req. No. 22, above. The Government has omitted these required paragraphs of the model "willfully causing" charge.

3. By omitting any such elements of the instruction tying the "willfully causing" charge to the specifics of the offenses charged in the indictment, the Government has proposed a free-floating instruction that would permit the jury to convict based on generalized conclusions that the defendants intended that some crime be committed by others, and that the defendants took some action without which crime would not have occurred, without requiring the jury to focus on, and decide, whether the defendants intended to cause, and did cause, others to commit the specific offenses charged in the indictment.

The Defendants object to Government Request No. 23 and to any instruction on conscious avoidance. The Defendants reserve the right to submit authorities and a proposed instruction if the Court determines that a conscious avoidance charge is permitted and is warranted by the evidence.

REQUEST NO. 23

Conscious Avoidance (If Applicable)

Objections to Gov. Req. No. 23: The Defendants object to any instruction on conscious avoidance unless the evidence at trial supports giving such an instruction under Second Circuit law. Defendants reserve the right to submit authorities and a proposed instruction as the evidence warrants.

1. *The Government must establish the predicate for a conscious avoidance charge.* In the Second Circuit, a conscious avoidance charge may be given only where a defendant asserts the lack of some specific knowledge required for conviction, *and* where the facts would allow the jury to conclude beyond a reasonable doubt that the defendant "was aware of a high probability [of the fact in dispute] and consciously avoided confirming that fact." *United States v. Ferrarini*, 219 F.3d 145, 154 (2d Cir. 2000); *United States v. Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993). Narrow application is necessary to distinguish between cases where the Defendant has *consciously decided* not to learn the key fact, and cases where the defendant merely "should have known" the fact, to avoid convicting a defendant for mere negligence. *Id.*("[E]ssential to the concept of *conscious* avoidance" is the requirement that the defendant "be shown to have *decided* not to learn the key fact, not merely to have failed to learn it through

negligence.") (emphasis added); *see also Ferrarini*, 219 F.3d at 157 ("conscious avoidance cannot be established when the factual context '*should have apprised* [the defendant] of the unlawful nature of [his] conduct.'") (citation omitted).[1] Because there can be no criminal liability for mere negligence, juries must be instructed in a way that avoids the possibility that they might convict merely because they conclude a defendant *should have known* something was suspicious.

Any decision on a conscious avoidance charge should be deferred until the close of the evidence, when the Court may evaluate whether the required factual predicate has been shown. The defendants respectfully reserve the opportunity to submit additional argument and a proposed instruction, if appropriate, at that time.

2. *The Government's Proposed Instruction Lacks Balancing Language Required by the Second Circuit.* In its conscious avoidance instruction, the government proposes instructing the jury that, if it finds "beyond a reasonable doubt that a defendant was aware that there was a high probability of a fact," it may treat that awareness as deliberate indifference. Govt. Proposed Instr. 41. It is "settled law that whenever 'high probability' language is used in a conscious avoidance instruction, 'balancing' language is necessary to instruct the jury" regarding a defendant's belief that his or her conduct was lawful. 1 L. Sand *et al.*, Modern Federal Jury Instructions, Instr. 3A-2 (citing *United States v. Boothe*, 994 F.2d 63, 69-70 & n.1 (2d Cir. 1993)). If a conscious avoidance instruction is warranted by the evidence, it must contain the following language: "However, if you find that the defendant actually believed that (*e.g.*, the

[1] *See also United States v. Reyes*, 302 F.3d 48, 54 (2d Cir. 2002) (conscious avoidance doctrine applies "only where it can almost be said that the defendant actually knew [that his conduct was unlawful] . . . but refrained from obtaining the final confirmation because he wanted . . . to be able to deny knowledge. This, and this alone, is willful blindness.") (citation omitted).

statement was true), he may not be convicted." *Id.* The Second Circuit consistently has reversed convictions where jury instructions omit this balancing language. *See United States v. Sicignano*, 78 F.3d 69, 71-72 (2d Cir. 1996); *United States v. Feroz*, 848 F.2d 359, 360-61 (2d Cir. 1988) (citing additional cases). Defendants therefore object to the government's proposed instruction.

3. *A Stand-Alone Conscious Avoidance Charge is Inappropriate*. Even if the required factual predicate for a conscious avoidance instruction is shown, the Court should include any such instruction in the state of mind instructions for each specific offense, as set forth in the Sand model instructions, not in a stand-alone instruction. A separate, blanket instruction such as the government proposes (Gov. Req. No. 23) that is not tied to the specific *mens rea* requirements of the charged offenses would confuse the jury, and invite the jury to convict on a mere negligence or "should have known" standard.

The Second Circuit's test for determining whether a conscious avoidance instruction is appropriate rests in part on a defendant's "assert[ion of] the lack of some specific aspect of knowledge required for conviction." *United States v. Quattrone*, 441 F.3d 153, 181 (2006), *mandamus dismissed*, 224 Fed.Appx. 106 (2d Cir. 2007). By requiring that a conscious avoidance instruction be given only where the defendant has asserted the lack of specific knowledge, the Second Circuit has integrated the proof necessary to establish conscious avoidance with the proof necessary to establish the specific *mens rea* for the charged offense—the "lack of some specific aspect of knowledge" is the equivalent of the lack of the requisite *mens rea*. As a result, the conscious avoidance instruction should be given, if at all, when the jury is instructed regarding the *mens rea* element of the charged offense.

Giving a stand-alone conscious avoidance instruction would also tend to mislead or confuse the jury, and unfairly prejudice the defendants, because it would invite jurors to speculate regarding what each defendant might have known under different circumstances, and thus to base a conviction on speculation rather than proof beyond a reasonable doubt. For all of these reasons, Defendants object to the inclusion of Government Request No. 23.

The Defendants consent to the Government's Request No. 24, with one suggested modification.

DEFENSE REQUEST NO. 24

Venue

Response to Gov. Req. No. 25: In the third to fourth line of the Government's request, Defendants respectfully submit that the language "in furtherance of the unlawful activity" presumes unlawful activity and is thus unduly suggestive of guilt. Defendants propose instead the language, "in furtherance of the offense charged in the count you are considering."

Note regarding sequence of charge: Defendants respectfully submit that because venue is an element applicable to all counts, the venue instruction should come after the instructions on the elements of the charged offenses, and before the defense of good faith or the alternative theories of liability such as Aiding and Abetting and Willfully Causing. Defendants therefore respectfully urge the Court to give the venue instruction after Def. Req. No. 20.5 ("Round Trips") and before Def. Req. No. 20.6 ("Good Faith").

D. THEORIES OF THE DEFENSE

The Defendants request the following instruction in addition to the Government's requests.

DEFENSE REQUEST NO. 24-A

Theories Of The Defense

[To be submitted by each defendant at the conclusion of the evidence.]

E. INSTRUCTIONS FOR DELIBERATIONS

The Government has requested that the Court give its usual general instruction on Witness Credibility. Gov. Req. 1.h. Defendants request the following general instruction on Witness Credibility.

DEFENSE REQUEST NO. 24-B

Witness Credibility – General Instruction

You have had an opportunity to observe all of the witnesses. It is now your job to decide how believable each witness was in his or her testimony. You, as jurors, are the sole judges of the credibility of each witness and of the weight that his or her testimony deserves.

It must be clear to you by now that you are being called upon to resolve various factual issues under the counts of the indictment, in the face of the very different pictures painted by the government and the defense which cannot be reconciled. You will now have to decide where the truth lies, and an important part of that decision will involve making judgments about the testimony of the witnesses you have listened to and observed. In making those judgments, you should carefully scrutinize all of the testimony of each witness, the circumstances under which each witness testified, and any other matter in evidence which may help you to decide the truth and the importance of each witness' testimony.

Your decision whether or not to believe a witness may depend on how that witness impressed you. Was the witness candid, frank and forthright? Or, did the witness seem as if he or she was hiding something, being evasive or suspect in some way? How did the way the witness testified on direct examination compare with how the witness testified on cross-examination? Was the witness consistent in his testimony or did he contradict himself? Did the witness appear to know what he or she was talking about and did the witness strike you as someone who was trying to report his or her knowledge accurately?

How much you choose to believe a witness may be influenced by the witness' bias. Does the witness have a relationship with the government or the defendant which may affect how he or she testified? Does the witness have some incentive, loyalty or motive that might cause him or her to shade the truth; or, does the witness have some bias, prejudice or hostility that may have caused the witness—consciously or not—to give you something other than a completely accurate account of the facts he or she testified to?

Even if the witness was impartial, you should consider whether the witness had an opportunity to observe the facts he or she testified about and you should also consider the witness' ability to express himself or herself. Ask yourselves whether the witness' recollection of the facts stands up in light of all other evidence.

In other words, what you must try to do in deciding credibility is to size a person up in light of his or her demeanor, the explanations given, and in light of all the other evidence in the case, just as you would in any important matter where you are trying to decide if a person is truthful, straightforward and accurate in his or her recollection. In deciding the question of credibility, remember that you should use your common sense, your good judgment, and your experience.

If a witness is shown to have knowingly testified falsely concerning any matter of importance to this case, you have the right to distrust any other portions of the witness' testimony, though you need not do so. You may reject any or all of the testimony of that witness or give it such credibility or weight as you think it deserves.[1]

[1] *United States v. Ebbers*, No. 02-cr-144 (S.D.N.Y. 2005); *United States v. Treacy,* No. 1:08-cr-366 (S.D.N.Y. 2009); *see also* L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 7-1 (2009). The final paragraph is from the instruction in *Ebbers*.

The Defendants request the following instruction in addition to the Government's requests.

DEFENSE REQUEST NO. 24-C

Witness Credibility – Bias and Hostility (If Applicable)

In connection with your evaluation of the credibility of the witnesses, you should specifically consider evidence of resentment or anger which some government witnesses may have toward one or both of the defendants.

In this case, **[insert facts relevant to specific witness(es) for whom potential bias or hostility has been shown]**.

Evidence that a witness is biased, prejudiced, or hostile toward any defendant requires you to view that witness' testimony with caution, to weigh it with care, and subject it to close and searching scrutiny.[1]

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[1] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 7-2 (2009), to account for multiple defendants; *see also United States v. Ebbers*, No. 02-cr-144 (S.D.N.Y. 2005). The Comment to Sand Instr. 7-2 states, "It is also appropriate to tailor the requested instruction to the specific facts involved," and gives an example of instructing on the particular source of bias or hostility as to a particular witness that may be shown at trial.

The Defendants object to Government Request No. 25, and in its place offer the following instruction.

Depending on the witnesses to whom they are applicable, it may be appropriate at the end of trial to combine some or all of Defense Requests No. 25, 26, 26-A, and/or 26-B.

DEFENSE REQUEST NO. 25

Witness Credibility -- Accomplices Called by the Government (If Applicable)

You have heard witnesses who testified that they were actually involved in planning and carrying out the crimes charged in the indictment. There has been a great deal said about these so-called accomplice witnesses in the summations of counsel and whether or not you should believe them.

The government argues, as it is permitted to do, that it must take the witnesses as it finds them. It argues that only people who themselves take part in criminal activity have the knowledge required to show criminal behavior by others.

For those very reasons, the law allows the use of accomplice testimony. Indeed, it is the law in federal courts that the testimony of accomplices may be enough in itself for conviction, if the jury finds that the testimony establishes guilt beyond a reasonable doubt.

However, it is also the case that accomplice testimony is of such nature that it must be scrutinized with great care and viewed with particular caution when you decide how much of that testimony to believe.

I have given you some general considerations on credibility and I will not repeat them all here. Nor will I repeat all of the arguments made on both sides. However, let me say a few things that you may want to consider during your deliberations on the subject of accomplices.

You should ask yourselves whether these so-called accomplices would benefit more by lying, or by telling the truth. Was their testimony made up in any way because they believed or hoped that they would somehow receive favorable treatment by testifying falsely? Or did they believe that their interests would be best served by testifying truthfully? If you believe that the witness was motivated by hopes of personal gain, was the motivation one which would cause him to lie, or was it one which would cause him to tell the truth? Did this motivation color his testimony?

In sum, you should look at all the evidence in deciding what credence and what weight, if any, you will want to give to the accomplice witnesses.[1]

Response to Gov. Req. No. 25: Defendants object to Government Request No. 25, and in its place offer Defense Request No. 25, for the following reasons:

1. Def. Req. No. 25 faithfully tracks the Sand model (Instr. 7-5) word-for-word. The Government's request, in contrast, modifies the model repeatedly in ways favorable to the prosecution, based on an assortment of reported and unreported charges from the 1970s through 1990s. *See* Government Requests to Charge at p. 61.

2. The Government's insertions of language favorable to the credibility of cooperators is based largely on a series of precedents from the 1970s. *See id.* (citing reported

[1] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 7-5 (2009); *United States v. Ebbers*, No. 02-cr-144 (S.D.N.Y. 2005); *see also United States v. Treacy*, No. 1:08-cr-366 (S.D.N.Y. 2009).

cases from 1972, 1976, 1977, and 1979). The Supreme Court's most recent word on the subject, however, has emphasized the "serious questions of credibility" raised by the testimony of alleged co-conspirators and witnesses granted benefits by the government. *Banks v. Dretke*, 540 U.S. 668, 701 (2004). Accordingly, the high Court has counseled the "submission of the credibility issue to the jury 'with careful instructions,'" and has approved the pattern instructions of a number of circuits (discussed in the Sand commentary) that emphasize the "special caution appropriate in assessing" testimony from witnesses who stand to benefit from Government leniency. *Banks*, 540 U.S. at 702; *see also United States v. Urlacher*, 979 F.2d 935, 938-39 (2d Cir. 1992) (noting with approval an instruction that an unindicted co-conspirator might fabricate testimony to receive favorable treatment, might be motivated to lie to serve his own interest, and that his testimony therefore should be carefully scrutinized); *United States v. Vaughn*, 430 F.3d 518, 522-23 & n.2 (2d Cir. 2005) (endorsing the similar Sand Instr. 7-11 (relating to cooperating witness's plea agreement), and instructing that the "better course" is to "specifically caution the jury to scrutinize the testimony of the cooperating witness with an eye to his motivation for testifying and what he stood to gain by testifying").

For all of these reasons, the Court should give the Sand model instructions on cooperating witness credibility as written, without the pro-prosecution modifications suggested by the Government.

The Defendants consent to the text of Government Request No. 26 and suggest modification of the title only.

REQUEST NO. 26

Witness Credibility – Government Witness – Not Proper to Consider Guilty Plea (If Applicable)

Response to Gov. Req. No. 26: The text of Request No. 26 tracks the Sand model instruction (1 Sand Instr. 7-10). Defendants respectfully submit that the title of the instruction should be as it is set out in Sand ("Government Witness – Not Proper to Consider Guilty Plea"), rather than "Accomplice Testimony – Guilty Plea," which suggests guilt by suggesting that in fact a crime was committed and the witness was an accomplice to the defendant(s).

The Defendants request the following instruction in addition to the Government's requests.

DEFENSE REQUEST NO. 26-A

Witness Credibility – Witness's Plea Agreement (If Applicable)

In this case, there has been testimony from a government witness who pled guilty after entering into an agreement with the government to testify. There is evidence that the government agreed to dismiss some charges against this witness and agreed not to prosecute him on other charges in exchange for his agreement to plead guilty and testify at this trial against the defendants. The government also entered into an agreement with this witness concerning sentencing issues and promised to bring his cooperation to the attention of the sentencing court.

The government is permitted to enter into this kind of plea agreement. You, in turn, may accept the testimony of such a witness and convict a defendant on the basis of this testimony alone, if it convinces you of every element of the offense charged beyond a reasonable doubt.

However, you should bear in mind that a witness who has entered into such an agreement has an interest in this case different than any ordinary witness. A witness who realizes that he may be able to obtain his own freedom, or receive a lighter sentence by giving testimony favorable to the prosecution, has a motive to testify falsely. Therefore, you must examine his testimony with caution and weigh it with great care. You should scrutinize it closely to determine whether it is colored in such a way as to place guilt upon a defendant in order to further the witness' own interests; for, such a witness, confronted with the realization that he can win his own freedom by helping to convict another, has a motive to testify falsely.

Such testimony should be received by you with suspicion and you may give it such weight, if any, as you believe it deserves.[1]

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[1] Adapted from 1 Sand Instr. 7-11; *United States v. Ebbers*, No. 02-cr-144 (S.D.N.Y. 2005); *United States v. Forbes*, No. 3:02 CR 264, at 67 (D. Conn. 2007). *See also Banks v. Dretke*, 540 U.S. 668, 701-02 (2004) (approving similar pattern instructions in the First, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits). In *Banks*, the Supreme Court emphasized it had long recognized "the 'serious questions of credibility' informers pose," and the need for "customary, truth-promoting precautions that generally accompany the testimony of informants." *See also On Lee v. United States*, 343 U.S. 747, 757 (1952); discussion in support of Def. Req. No. 25, supra.

The fourth and fifth sentences of the third paragraph are from 1 Sand Instr. 7-9, and clarify the jury's role in evaluating witness credibility.

The Defendants request the following instruction in addition to the Government's requests.

DEFENSE REQUEST NO. 26-B

Witnesses Credibility – Informal Immunity of a Government Witness (If Applicable)

You have heard the testimony of a witness who has been promised that in exchange for testifying truthfully, completely, and fully, he or she will not be prosecuted for any crimes which he or she may have admitted either here in court or in interviews with the prosecutors. This promise was not a formal order of immunity by the Court, but was arranged directly between these witnesses and the government.

The government is permitted to make these kinds of promises and is entitled to call as witnesses people to whom these promises are given. You are instructed that you may convict a defendant on the basis of such a witness' testimony alone, if you find that his or her testimony proves the defendant guilty beyond a reasonable doubt.

However, the testimony of a witness who has been promised that he or she will not be prosecuted should be examined by you with greater care than the testimony of an ordinary witness. You should scrutinize it closely to determine whether or not it is colored in such a way as to place guilt upon the defendant in order to further the witness' own interests; for, such a witness, confronted with the realization that he or she can win his or her own freedom by helping to convict another, has a motive to testify falsely.

Such testimony should be received by you with suspicion and you may give it such weight, if any, as you believe it deserves.[1]

[1] Adapted from 1 Sand Instr. 7-9; *see Banks v. Dretke*, 540 U.S. 668, 701-02 (2004) (approving similar pattern instructions in the First, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits); discussion in support of Def. Req. No. 25, *supra*.

The Defendants request the following instruction in addition to the Government's requests.

DEFENSE REQUEST NO. 26-C

Witness Credibility – Hearsay Testimony (If Applicable)

You have heard about a number of statements made outside of court by witnesses who did not testify here in court. When a witness' out-of-court statement has been admitted, that witness' credibility may be attacked, and if attacked may be supported, in the same manner as if the witness had testified in court.[1]

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[1] *See* Fed. R. Evid. 806; *Carver v. United States*, 164 U.S. 694, 697 (1897).

The Defendants request the following instruction in addition to the Government's requests.

DEFENSE REQUEST NO. 26-D

Opinion as to Character of Witness To Impeach Witness' Credibility (If Applicable)

You have heard [**name of witness**] testify that in his opinion [**name of other witness**], one of the other witnesses who testified is an untruthful person. Since you are the sole judges of the facts and the credibility of witnesses, you may consider such evidence in deciding whether or not to believe the witness whose character for truthfulness has been questioned, giving such character evidence whatever weight you deem appropriate.[1]

[1] 1 Sand Instr. 5-18.

The Defendants request the following instruction in addition to the Government's requests.

DEFENSE REQUEST NO. 26-E

Witness Credibility – Law Enforcement or Government Witnesses (If Applicable)

You have heard the testimony of certain witnesses employed by the federal government or law enforcement. **[Identify relevant witnesses—*e.g.*, FBI, SEC, or Postal Inspection witnesses.]** The fact that a witness may be employed by the federal government as a law enforcement official or employee does not mean that his or her testimony is necessarily deserving of more or less consideration, or greater or lesser weight than that of an ordinary witness.

At the same time, it is quite legitimate for defense counsel to try to attack the credibility of a government or law enforcement witness on the grounds that his or her testimony may be colored by a personal or professional interest in the outcome of the case.

It is your decision, after reviewing all the evidence, whether to accept the testimony of the government and law enforcement witness(es) and to give to that testimony whatever weight, if any, you find it deserves.[1]

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[1] Adapted from 1 Sand Instr. 7-16 to include not only sworn law enforcement agents but also civilian enforcement employees.

The Defendants request the following instruction in addition to the Government's requests.

DEFENSE REQUEST NO. 26-F

Witness Credibility – Expert Witness (If Applicable)

In this case, I have permitted certain witnesses to express their opinions about matters that are at issue. **[insert name(s) and very brief description of subject matter of testimony.]** A witness may be permitted to testify to an opinion on those matters about which he or she has special knowledge, skill, experience and training. Such testimony is presented to you on the theory that someone who is experienced and knowledgeable in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing this opinion testimony, you may consider the witness' qualifications, his or her opinions, the reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness' testimony. You may give the opinion testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept opinion testimony merely because I allowed the witness to testify concerning his or her opinion. Nor should you substitute it for your own reason, judgment and common sense. The determination of the facts in this case rests solely with you.[1]

[1] Adapted from 1 Sand Instr. 7-21 to identify witnesses permitted to testify as experts.

The Defendants object to Government Request No. 27, and in its place offer the following instruction.

DEFENSE REQUEST NO. 27

Defendant's Reputation and Opinion of Defendant's Character (If Applicable)

Mr. [**insert relevant Defendants' name(s) at close of case**] [**has/have**] called witnesses who testified to [**his/their**] good reputation in the community. Some of those witnesses have also given their opinion of Mr. [**insert relevant Defendants' name(s) at close of case**]'s good character. This testimony is not to be taken by you as the witness' opinion as to whether [**insert relevant Defendants' name(s) at close of case**] [**is/are**] guilty or not guilty. That question is for you alone to determine. You should, however, consider this character evidence together with all the other facts and all the other evidence in the case in determining whether [insert **relevant Defendants' name(s) at close of case**] [**is/are**] guilty or not guilty of the charges.

Such character evidence alone may indicate to you that it is improbable that a person of good reputation would commit the offense charged. Accordingly, if after considering all the evidence, including testimony about **[insert relevant Defendants' name(s) at close of case]** good reputation and character, you find a reasonable doubt has been created, you must acquit **[him/them]** of all charges.

On the other hand, if after considering all the evidence, including that of defendant's reputation and character, you are satisfied beyond a reasonable doubt that the defendant is guilty, you should not acquit the defendant merely because you believe him to be a person of good reputation or good character.[1]

Response to Gov. Req. No. 27: Defendants offer Defense Request No. 27 in place of Government Request No. 27 for the following reasons:

1. The instruction should include not only reputation, but also good character. Defense Request No. 27 combines the two relevant instructions. *See* 1 Sand Instr. 5-14, 5-15.

2. So combined, the Defense Request No. 27 faithfully tracks the Sand models, which are more complete than Government Request No. 27. Though the Sand models and Defense Request No. 27, unlike Government Request No. 27, instruct the jury on whether it may acquit or convict in light of its consideration of reputation and character evidence, they do so in evenhanded fashion.

[1] Adapted to combine the Sand instructions on reputation and character, 1 Sand Instrs. 5-14 and 5-15, and to account for multiple defendants.

The Defendants request the following instruction in addition to the Government's requests.

DEFENSE REQUEST NO. 27-A

Cross-Examination of Witness on Defendant's Character (If Applicable)

The prosecution asked certain questions on cross-examination of Mr. **[insert relevant Defendants' name(s) at close of case]**'s character witness**[es]** about specific acts supposedly committed by Mr. **[insert relevant Defendants' name(s) at close of case]**. I caution you that the prosecution was allowed to ask these questions only to help you decide whether the witness**[es] [was/were]** accurate in forming **[his/her/their]** opinion**[s]** or in describing the reputation of Mr. **[insert relevant Defendants' name(s) at close of case]**'s character. You may not assume that the acts described in these questions are true, nor may you consider them as evidence that Mr. **[insert relevant Defendants' name(s) at close of case]** committed the crimes for which **[he/they] [is/are]** charged. You may therefore consider the questions only in deciding what weight, if any, should be given to the testimony of each character witness and for no other purpose. You should not consider such questions as any proof of the conduct stated in the question.[1]

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[1] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 5-16 (2009), to account for multiple defendants.

The Defendants object to Government Request No. 28, and in its place offer the following instruction.

DEFENSE REQUEST NO. 28

Testimony of Defendant (If Applicable)

The defendant in a criminal case never has any duty to testify or come forward with any evidence. This is because, as I have told you, the burden of proof beyond a reasonable doubt remains on the government at all times, and the defendant is presumed innocent. In this case, Mr. [**insert relevant Defendants' name(s) at close of case**] did testify and **[he was/they were]** subject to cross-examination like any other witness. You should examine and evaluate [**his/their**] testimony just as you would the testimony of any witness with an interest in the outcome of the case. You should not disregard or disbelieve [**his/their**] testimony simply because [**he is/they are**] charged as **[a defendant/defendants]** in this case.[1]

Response to Gov. Req. No. 28: Defendants object to Gov. Req. No. 28, and in its place offer Def. Req. No. 28, for the following reasons:

1. Gov. Req. No. 28, which is adapted from case law and an unpublished jury charge rather than the model instruction, omits several important components of the model instruction, including:

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[1] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 7-4 (2009).

(a) a reminder that the defendants have no duty to testify or come forward with evidence (particularly important here if one defendant testifies, drawing this instruction, while the other exercises his right not to testify);

(b) a reminder that the defendant is presumed innocent (which is necessary here to balance the instruction that the defendant has an interest in the outcome of the case);

(c) a statement that the testifying defendant was subject to cross-examination like any other witness; and, most importantly,

(d) an admonition that "You should not disregard or disbelieve [the defendant's] testimony simply because he is charged as a defendant in this case."

Without the last admonition, the instruction casts an aspersion on a defendant who exercises his right to testify in his defense, by suggesting that his testimony is less trustworthy than that of other witnesses because he is the accused.

Defendants object to the omission of all of these cautions, and respectfully urge the Court, if either defendant testifies, to give the Sand model instruction.

The Defendants object to Government Request No. 29, and in its place offer the following instruction.

DEFENSE REQUEST NO. 29

Improper Consideration of Defendant's Right Not to Testify (If Applicable)

Mr. **[insert relevant Defendants' name(s) at close of case]** did not testify in this case. Under our Constitution, a defendant has no obligation to testify or to present any other evidence because it is the government's burden to prove each defendant guilty beyond a reasonable doubt. That burden remains with the government throughout the entire trial and never shifts to the defendant. No defendant is ever required to prove that he is innocent.

You may not attach any significance to the fact that Mr. **[insert relevant Defendants' name(s) at close of case]** did not testify. No adverse inference against **[him/either of them]** may be drawn by you because **[he/they]** did not take the witness stand. You may not consider this against any defendant in any way in your deliberations in the jury room.[1]

Response to Gov. Req. No. 29: The parties are in agreement on the essential text of the instruction, which in both Def. Req. 29 and Gov. Req. 29 is drawn straight from Sand model Instr. 5-21. The Defense respectfully offers its version, above, which has been adapted for multiple defendants, and also refers to the defendants by their names rather than as "the defendant." The Defense respectfully submits that referring to the defendants only as "the defendants" is prejudicial in that it unduly suggests guilt, and that referring to them by their names is more consistent with the presumption of innocence.

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[1] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 5-21 (2009); *United States v. Treacy*, No. 1:08-cr-366 (S.D.N.Y. 2009).

The Defendants request the following instruction in addition to the Government's requests.

DEFENSE REQUEST NO. 29-A

Admission of Defendant[s] (If Applicable)

There has been evidence that **[a/the]** defendant**[s]** made **[a/certain]** statement**[s]** in which the government claims **[he/they]** admitted certain facts charged in the indictment.

In deciding what weight to give **[the/any]** defendant's statement**[s]**, you should first examine with great care whether **[the/each]** statement was made and whether, in fact, it was voluntarily and understandingly made. I instruct you that you are to give the statement**[s]** such weight as you feel **[it/they]** deserve**[s]** in light of all the evidence.

You are cautioned that the evidence of one defendant's statement to the authorities about his own conduct may not be considered or discussed by you in any way with respect to the other defendant on trial.[1]

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[1] Adapted from 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 5-19, 5-20 (2009), to account for multiple defendants.

The Defendants request the following instruction in addition to the Government's requests.

DEFENSE REQUEST NO. 29-B

Acts and Declarations of Alleged Co-Conspirators (If Applicable)

Evidence has been received in this case which the government contends shows that **[insert relevant names at close of trial]** allegedly did or said things during the alleged existence of the alleged conspiracy in order to further or advance its purposes. Evidence of such alleged acts and statements of these individuals may be considered by you in determining whether or not the government has proven the charge in Count One of the indictment. However, since some of these alleged acts or statements may have occurred outside the presence of a defendant—and even been allegedly done or said without a defendant's knowledge—these alleged acts and statements should be examined with particular care by you before you consider them with respect to a defendant who did not do the particular alleged act or make the particular alleged statement.[1]

[1] 2 O'Malley, *et al.*, Federal Jury Practice and Instructions, § 31.06 (6th ed. 2006); *United States v. Forbes*, No. 3:02 CR 264, at 66-67 (D. Conn. 2007).

The Defendants object to Government Request No. 30, and in its place offer the following instruction.

DEFENSE REQUEST NO. 30

Similar Acts (If Applicable)

The government has offered evidence tending to show that on a different occasion, Mr. **[insert relevant Defendants' name(s) at close of case]** engaged in conduct similar to the charges in the indictment.

In that connection, let me remind you that no defendant is on trial for committing any act not alleged in the indictment. Accordingly, you may not consider this evidence of the similar act as a substitute for proof that any defendant committed the crime charged. Nor may you consider this evidence as proof that any defendant has a criminal personality or bad character. The evidence of the other, similar act was admitted for a much more limited purpose, namely, as potential evidence of the defendant's motive, opportunity, intent, knowledge, plan, and absence of mistake, and you may consider it only for that limited purpose.

Evidence of similar acts may not be considered by you for any other purpose. Specifically, you may not use this evidence to conclude that because a defendant committed the other act he must have committed the acts charged in the indictment. Such evidence about a defendant's other similar acts can only be considered regarding that defendant, and cannot be considered regarding any other defendant.[1]

[1] Adapted from 1 Sand Instr. 5-25 to account for multiple defendants, and to incorporate the limited purpose language contained in Government Request No. 30.

Response to Gov. Req. No. 30: Defendants object to Government Request No. 30, and in its place offer Defense Request No. 30, for the following reasons:

1. Defendants object to the title of Gov. Req. No. 30, "Evidence of Other Crimes, Wrongs or Acts," as argumentative and unduly suggestive of guilt. The Government may seek to have admitted evidence of similar acts that may be subject to dispute about whether they are wrongful. If the wrongfulness or the existence of such acts are in dispute, the Government should not receive the benefit of the Court labeling those acts "Other Crimes" or "Wrongs" before the jury. The instruction should carry the title it carries in the Sand model instructions, "Similar Acts."

2. The Sand model instructions contain different "Similar Acts" instructions depending on the limited purpose for which the similar acts evidence is offered. Other than reciting that purpose, the instructions do not differ significantly. The Government's proposed language describing its anticipated limited purposes generally tracks the language of Federal Rule of Evidence 404(b): "motive, opportunity, intent, knowledge, plan, and absence of mistake . . . ." Gov. Req. No. 30. For simplicity, and to try to conform with the Government's proposal, Def. Req. No. 30 offers just one "similar acts" instruction, patterned on 1 Sand Instr. 5-25, that incorporates most of the Government's Rule 404(b) language.

3. The last limited purpose contained in the Government's proposed instruction is "to provide background for the alleged conspiracy." Gov. Req. No. 30. This is not a proper purpose under Rule 404(b), and Defendants will object to admission of any "similar acts" evidence offered for this purpose. This purpose should not be included in the Rule 404(b) limiting instruction.

The Defendants object to Government Request No. 31, and in its place offer the following instruction.

DEFENSE REQUEST NO. 31

Uncalled Witness – Equally Available to Both Sides (If Applicable)

There are several persons whose names you have heard during the course of the trial but who did not appear here to testify, and one or more of the attorneys has referred to their absence from trial. I refer here to **[name witness(es) who were equally available]**. I instruct you that each party had an equal opportunity or lack of opportunity to call any of these witnesses. Therefore, you should not draw any inferences or reach any conclusions as to what they would have testified to had they been called. Their absence should not affect your judgment in any way.

You should, however, remember my instruction that the law does not impose on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.[1]

Response to Gov. Req. No. 31: Defendants object to Government Request No. 31, and in its place offer Defense Request No. 31, for the following reasons:

1. Defendants object to Gov. Req. No. 31 as outdated and contrary to current law as reflected in the current Sand model instruction (1 Sand Instr. 6-7).

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[1] Adapted from 1 Sand Instr. 6-7 to name the witness(es) to whom the instruction applies. Defendants respectfully submit that if some witnesses were equally available or unavailable, but some other witnesses were unequally available or unavailable, it is necessary to instruct the jury on which instructions apply to which witnesses.

2. Like much of the Government's proposed charge, Gov. Req. No. 31 is based on an assortment of case law from the 1970s, 1980s, and 1990s. Gov. Req. No. 31 urges an instruction—that the jury may draw inferences from the failure of either side to call an equally available or equally unavailable witness—that the current Sand model indicates is contrary to current authority. *See* commentary to 1 Sand Instr. 6-7.

3. The current Sand model recommends instructing the jury, as reflected in Def. Req. No. 31, that no inference should be drawn in this situation.

The Defendants request the following instruction in addition to the Government's requests.

DEFENSE REQUEST NO. 31-A

Missing Witness Not Equally Available to Defendant (If Applicable)

You have heard evidence about a **[number of]** witness**[es]** who **[has/have]** not been called to testify. The defense has argued that the witness**[es]** could have given material testimony in this case and that the government was in the best position to produce **[this/these]** witness**[es]**. I refer here to **[name witness[es] who may not have been equally available to defendants].**

If you find that **[this/these]** uncalled witness**[es]** could have been called by the government and would have given important new testimony, and that the government was in the best position to call **[him/them]**, but failed to do so, you are permitted, but you are not required, to infer that the testimony of the uncalled witness**[es]** would have been unfavorable to the government.

In deciding whether to draw an inference that the uncalled witness**[es]** would have testified unfavorably to the government, you may consider whether the witness**[es]**' testimony would have merely repeated other testimony and evidence already before you.[1]

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[1] Adapted from 1 Sand Instr. 6-5 to account for multiple witnesses, and to name the witness(es) to whom the instruction applies. Defendants respectfully submit that if some witnesses were equally available or unavailable, but some other witnesses were unequally available or unavailable, it is necessary to instruct the jury on which instructions apply to which witnesses.

Defendants object that Gov. Req. No. 32 will not be warranted by the defense arguments. However, if at the close of trial the Court concludes the instruction is warranted by the facts and the arguments, Defendants do not object to the text of Government Request No. 32.

REQUEST NO. 32

Particular Investigative Techniques Not Required (If Applicable)

The Defendants object to Government Request No. 33, and in its place offer the following instruction.

DEFENSE REQUEST NO. 33

Jury to Consider Only These Defendants

You are about to be asked to decide whether or not the government has proven beyond a reasonable doubt the guilt of these defendants. You are not being asked whether any other person has been proven guilty. Your verdict should be based solely upon the evidence or lack of evidence as to each of these individual defendants, in accordance with my instructions and without regard to whether the guilt of other people has or has not been proven.[1]

Response to Gov. Req. No. 33: Defendants object to Government Request No. 33 in its entirety ("Persons Not On Trial"), because it is inconsistent with the instructions on the credibility of cooperating witnesses or witnesses promised immunity from prosecution. The point of the "customary" and "careful" instructions regarding the credibility of such witnesses, *Banks v. Dretke*, **[cite]**, is that such witnesses may have motive to testify falsely, and to shade their testimony in favor of the prosecution and against the defendants, precisely to avoid prosecution. As to these witnesses, the jury absolutely should consider why those persons are not on trial, and how it may affect their credibility as witnesses—contrary to the instruction offered in Government Request No. 33.

Government Request No. 33 is not supported by any citation to model authority, but instead only by an unreported trial charge from a 1977 case. Government Requests to Charge at

[1] 1 Sand Instr. 2-18 (adapted for multiple defendants).

70. In place of Government Request No. 33, the Defendants offer the Sand model instruction, Instr. 2-18, which captures the idea that the jury should consider only these defendants and not others, without including overbroad language that would preclude the jury's consideration of any connection between the credibility of cooperating witnesses' testimony and the fact that those witnesses have received leniency from the Government.

The Defendants consent to Government Request No. 34.

REQUEST NO. 34

Preparation of Witnesses

The Defendants object to Government Request No. 35, and in its place offer the following instruction.

DEFENSE REQUEST NO. 35

Consider Each Defendant Separately

The indictment names two defendants who are on trial together. In reaching a verdict, however, you must bear in mind that guilt or innocence is individual. Your verdict as to each defendant must be determined separately with respect to him, solely on the evidence, or lack of evidence, presented against him without regard to the guilt or innocence of anyone else.

[If applicable:] In addition, some of the evidence in this case was limited to one defendant. Let me emphasize that any evidence admitted solely against one defendant may be considered only as against that defendant and may not in any respect enter into your deliberations on the other defendant.[1]

Response to Gov. Req. No. 35: Defendants offer Defense Request No. 35 ("Consider Each Defendant Separately") in place of Government Request No. 35 ("Multiple Counts") for the following reasons:

1. The Government offers only a truncated version of the full "multiple counts, multiple defendants" instruction in the Sand model. 1 Sand Instr. 3-8. Defendants respectfully urge that, when given, the full Sand Instr. 3-8 should be given.

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[1] 1 Sand Instr. 3-5. In the second sentence, we have added "or innocence" after "guilt" for evenhandedness. We have further noted that the second paragraph applies only if some evidence is admitted against one defendant but not the other.

2. Defendants submit that the "multiple counts, multiple defendants" instruction should be given at the beginning of the charge, before discussion of the charges contained in the indictment. Defendants have requested that the Sand Instr. 3-8 instruction be given at that point. *See* Def. Req. No. 1-A, *supra*.

3. Here at the end of the charge, before the jury is to retire to consider its verdict, Defendants submit that the more appropriate instruction to give is "Consider Each Defendant Separately," 1 Sand Instr. 3-5. This request instructs the jury, before it begins to consider the verdict, that the verdict as to each defendant must be based on the proof only as to that Defendant. The close of the charge, rather than the opening of the charge, is also an appropriate time to instruct the jury, as in the second paragraph of Def. Req. No. 35 above, that any evidence admitted only against one defendant "may not in any respect enter into your deliberations on any other defendant." 1 Sand Instr. 3-5. Def. Req. No. 35 changes "any other defendant" to "the other defendant" since only two defendants are on trial.

The Defendants consent to Government Request No. 36, with one suggestion.

REQUEST NO. 36

Stipulations (If Applicable)

Response to Gov. Req. No. 36: Defendants have no objection to Gov. Req. No. 36. However, Defendants have requested that the Court give its standard instruction covering, more broadly, Testimony, Exhibits, Stipulations, and Judicial Notice. *See* Request No. 1.p, *supra*. Such a broader instruction would subsume a specific instruction on stipulations.

The Defendants request the following instruction in addition to the Government's requests.

DEFENSE REQUEST NO. 36-A

Markings on Exhibits

Many of the exhibits in this case were stamped "confidential" or "redacted" or with identification numbers and/or letters before being provided to the parties as part of the litigation process. It is routine to stamp documents confidential or with identification numbers and/or letters in the litigation process. You are to draw no inference from the fact that a document was stamped confidential or with identification numbers and/or letters before being provided.[1]

[1] Adapted from *United States v. Forbes*, No. 3:02 CR 264, at 65 (D. Conn. 2007).

The Defendants object to Government Request No. 37 and in its place offer the following instruction.

DEFENSE REQUEST NO. 37

Conclusion – Duty to Consult and Need for Unanimity

Your function now is to weigh the evidence in this case and to determine the guilt or innocence of each defendant with respect to each count of the Indictment.

The government, to prevail, must prove the essential elements by the required degree of proof, as already explained in these instructions. If it succeeds, your verdict should be guilty; if it fails, your verdict should be not guilty. To report a verdict, it must be unanimous.

You must base your verdict solely upon the basis of the evidence and these instructions as to the law. You are obliged by your oath as jurors to follow the law as I instruct you, whether you agree or disagree with the particular law in question.

Each juror is entitled to his or her opinion; each should, however, exchange views with his or her fellow jurors. That is the very purpose of jury deliberation—to discuss and consider the evidence; to listen to the arguments of fellow jurors; to present your individual views; to consult with one another; and to reach an agreement based solely and wholly on the evidence—if you can do so without violating your own individual judgment.

Each of you must decide the case for yourself, after consideration, with your fellow jurors, of the evidence in the case.

But you should not hesitate to change an opinion which, after discussion with your fellow jurors, appears erroneous.

However, if, after carefully considering all the evidence and the arguments of your fellow jurors, you entertain a conscientious view that differs from the others, you are not to yield your conviction simply because you are outnumbered.

Your final vote must reflect your conscientious conviction as to how the issues should be decided.[1]

Response to Gov. Req. No. 37: Defendants object to Gov. Req. No. 37, and in its place offer Def. Req. No. 37, for the following reasons:

1. Defendants request the Sand model instruction (Instr. 9-7), rather than the Government's offered amalgam of earlier unpublished charges. *See* Gov. Requests to Charge at 75.

2. The Sand model instruction, unlike the Government's Request No. 37, appropriately reminds the jury at the conclusion of the charge (without undue repetition or argument) of the required burden and degree of proof. *See* second paragraph. The instruction explains, in evenhanded fashion, that "If [the government] succeeds, your verdict should be guilty; if it fails, your verdict should be not guilty."

3. To compromise and incorporate the Government's requested language, Defendants have modified the Sand model instruction by adding the following language taken from Gov. Req. No. 37:

(a) the first paragraph of Def. Req. No. 37 above (beginning "Your function now is to weigh . . .");

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[1] 1 L. Sand, *et al.*, Modern Federal Jury Instructions, Instr. 9-7 (2009).

(b) the third paragraph above (taken from the second paragraph of Gov. Req. No. 37) (beginning, “You must base your verdict . . . .”); and

(c) Defendants have further incorporated the fifth and sixth paragraphs of Gov. Req. No. 37 into the end of Def. Req. No. 37-A, *infra*.

4. Defendants respectfully submit that the Sand model instruction more fully, fairly and accurately instructs the jurors regarding their twin obligations to deliberate with their fellow jurors with an open mind but not to surrender their own honest and firmly held convictions.

5. Defendants have omitted the last sentence of 1 Sand Instr. 9-7 (“Your verdict, whether guilty or not guilty, must be unanimous”) because it suggests the jury *must* reach a unanimous verdict, even despite a good faith impasse.

6. Defendants object to the last paragraph of Gov. Req. No. 37, regarding prejudice or sympathy, as unnecessary and potentially suggestive or argumentative.

The Defendants request the following instruction in addition to the Government's requests.

DEFENSE REQUEST NO. 37-A

Unanimity of Theory

Your verdict must also be unanimous in another sense. Each offense charged in the indictment—conspiracy, securities fraud, and false statements to auditors and the SEC—contains multiple, alternative theories of guilt. For each count and each defendant, in order to convict, you must be unanimous as to which theory of guilt applies.

For instance, Count One of the indictment charges that each defendant joined and participated in a conspiracy to commit several offenses: to defraud; to make misrepresentations and omissions of material fact in reports and documents to be filed by Duane Reade as required by the SEC; and to willfully falsify and cause to be falsified the books, records, and accounts of Duane Reade. To find guilt on Count One, you must be unanimous as to which of these alleged unlawful goals of the conspiracy the defendants agreed to.

Count One further charges that, to achieve the goals of the charged conspiracy, one of its members committed one or more of several overt acts as specified in the indictment. To find any defendant guilty on Count One, you must be unanimous as to at least one of these particular alleged acts that was committed by a member of the alleged conspiracy, during the conspiracy, and in furtherance of the conspiracy.

Similarly, Count Two charges that the defendants knowingly and willfully employed a scheme to defraud; made misrepresentations and omissions of material facts; and engaged in acts which operated as a fraud upon members of the investing public in connection with the purchases and sales of Duane Reade securities. To find any defendant guilty on Count Two, you must be unanimous as to which type of fraud, if any, the defendant engaged in (*i.e.*, which scheme to defraud, or which misrepresentations or omissions of material facts, or which other acts which operated as a fraud on the investing public).

Similarly, Counts Three through Five charge that the defendants willfully and knowingly made or caused to be made misleading statements of material fact in reports and documents filed by Duane Reade as required by SEC rules and regulations. To find guilt on any of Counts Three through Five, you must be unanimous as to which statement of material fact in which report or document was false or misleading.

For each of these counts, in order to convict a particular defendant on that count, all twelve of you must agree on the specific offense committed and the specific theory by which he committed it. For each count and each defendant, if all twelve of you do not agree, you may not convict that defendant on that count.

Remember at all times, you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

If you are divided, do *not* report how the vote stands, and if you have reached a verdict, do not report what it is until you are asked in open court.

In conclusion, Ladies and Gentlemen, I am sure that if you listen to the views of your fellow jurors and if you apply your own common sense you will reach a fair verdict here.[1]

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[1] Adapted from 1 Sand Instr. 9-7A. "Instruction 9-7A has been drafted for conspiracy counts, but may be adapted when other crimes are charged requiring this augmented unanimity charge." *Id.*, Comment to Instr. 9-7A; *see also* the cases collected in the Comment to Instr. 9-7A.

Defendants have added the fifth through seventh paragraphs of the Government's language from Gov. Req. No. 37 onto the end of 1 Sand Instr. 9-7A.

Respectfully submitted,

/s/ Reid H. Weingarten

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